

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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UNITED STATES OF AMERICA, : Case No. 1:16-cr-00224
: Cleveland, Ohio
Plaintiff, :
:
v. : Friday, December 6, 2019
:
BOGDAN NICOLESCU :
RADU MICLAUS, :
:
Defendants. :
-----X

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE THE HONORABLE PATRICIA A. GAUGHAN
UNITED STATES CHIEF DISTRICT JUDGE

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Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

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1 MORNING SESSION, FRIDAY, DECEMBER 6, 2019

2 (Proceedings commenced at 9:40 a.m.)

3 - - -

4 DEPUTY CLERK: All rise.

09:40:28 5 THE COURT: Please be seated.

6 We are here in the matter of *United States of America*
7 *v. Bogdan Nicolescu and Radu Miclaus*, Case Number 16-cr-224.

8 Present in court is Mr. Nicolescu; is that correct,
9 sir?

09:41:19 10 DEFENDANT NICOLESCU: Yes.

11 THE COURT: Represented by his attorney,
12 Mr. Michael Goldberg.

13 Also present is --

14 MR. GOLDBERG: Good morning, Your Honor.

09:41:23 15 THE COURT: Good morning.

16 Also present is Mr. Miclaus, correct, sir?

17 DEFENDANT MICLAUS: Yes.

18 THE COURT: Represented by his attorney,
19 Mr. Michael O'Shea.

09:41:35 20 MR. O'SHEA: Good morning, Your Honor.

21 THE COURT: Good morning.

22 On behalf of the Government is Mr. Duncan Brown.

23 MR. BROWN: Good morning, Your Honor.

24 THE COURT: Good morning.

09:41:39 25 And Mr. Brian McDonough.

1 MR. McDONOUGH: Good morning, Your Honor.

2 THE COURT: Good morning.

3 And seated between them is Special Agent

4 Ryan Macfarlane.

09:41:46 5 AGENT MACFARLANE: Good morning, Your Honor.

6 THE COURT: Good morning.

7 On behalf of probation, Ms. Naomi Morgan.

8 We're here today for purposes of sentencing. On

9 April 11th, a jury returned a verdict on all counts as to

09:41:59 10 both defendants, specifically Counts 1, 2 through 13, 14,

11 15, 16 through 20, and 21. But not guilty of the

12 enhancement as to both defendants.

13 At that time I referred both matters to the probation

14 department for a presentence investigation report.

09:42:20 15 I do, in fact, have the reports as to both defendants.

16 The Court notes that as to both defendants, the

17 calculations are the same. It is my intention to now go

18 over those calculations. And, again, it relates to both.

19 According to the reports, the base offense level is 7.

09:42:48 20 20 levels are added due to the amount of loss being between

21 9.5 million and 25 million.

22 Two more levels are added because the offense involved

23 ten or more victims.

24 Two more levels are added in that the defendants

09:43:06 25 received and sold stolen credit card accounts and personal

1 account information.

2 Two more levels are added for sophisticated means.

3 Two more levels are added in that the defendants
4 fraudulently obtained credit card information.

09:43:29 5 Four more levels are added because there was a
6 conviction under 1030a5A, for a base offense level of 39.

7 Two levels added in that there was a conviction under
8 18 U.S.C. 1956.

9 Two more levels are added for sophisticated
09:43:49 10 laundering.

11 There are no victim-related adjustments.

12 Four levels are added for role in the offense.

13 No obstruction of justice, for an adjusted offense
14 level subtotal of 47.

09:44:04 15 No Chapter 4 enhancements.

16 No adjustment for acceptance of responsibility, for a
17 total offense level of 47, which becomes a 43 pursuant to
18 the instructions in the guidelines.

19 As to Count 16 through 20, aggravated identity theft,
09:44:27 20 the guideline sentence is the term of imprisonment required
21 by statute, which is two years consecutive to any other term
22 of imprisonment.

23 The Court is in receipt of several sentencing
24 memorandums. I have, in fact, reviewed them all.

09:44:47 25 Subsequent to receiving the briefing, the Court has

1 been made aware that the Government's lawyers and the
2 defense lawyers have, in fact, had further discussions and
3 have agreed on some of the calculations that I just went
4 over for the record.

09:45:10 5 So I'm now going to go over the calculations again and
6 state where there's agreement and where there is
7 disagreement.

8 All parties agree that the base offense level is a 7.

9 And regarding how much should be added to that for
09:45:35 10 amount of loss, it is the Government's position that it is
11 not a 20, but that it should be an 18, for a loss of between
12 3.5 and \$9.5 million.

13 The defendants do not believe it should be a 20. They
14 believe that it should be increased by 16, which is a loss
09:46:03 15 of between 1.5 and \$3.5 million.

16 Everyone agrees that two levels should be added in
17 that the offense involved ten or more victims.

18 The Government believes that two levels should be
19 added because of the receipt and selling of stolen property.

09:46:34 20 The defendants do not believe the two levels should be
21 afforded.

22 All parties agree that the two levels for
23 sophisticated means should be given.

24 The Government believes two levels should be added for
09:46:58 25 fraudulently obtaining credit card information.

1 The defendants do not believe those two levels should
2 be added.

3 The Government believes that the four levels should be
4 added for the conviction under 1030. The defendants do not
09:47:16 5 believe that should be added.

6 The Government believes that under specific offense
7 characteristics, two levels should be added because of the
8 conviction under 1956.

9 Defendants do not believe it should be afforded.

09:47:36 10 Now, as to sophisticated laundering, the Court is a
11 bit confused as to the Government's position.

12 Am I correct that because sophisticated -- it's been
13 agreed upon that the two levels should be added in
14 paragraph 49 for sophisticated means, that you are agreeing
09:48:04 15 to not advocate for the two levels for sophisticated
16 laundering, or am I simply incorrect on that?

17 MR. BROWN: Your Honor, the Government's
18 position would be that the special -- the argument has
19 always been the special skills would apply across the board
09:48:21 20 to all of the conduct, including nonmoney laundering
21 techniques, but very sophisticated money laundering as
22 argued in our brief, that the setting up of the money in the
23 company --

24 THE COURT: Okay. I don't want to hear
09:48:37 25 argument. This is my question.

1 MR. BROWN: We would argue --

2 THE COURT: Is it the Government's position
3 that the two levels should be added in paragraph 49 for
4 sophisticated means, and that the two levels should be added
09:48:49 5 for sophisticated laundering?

6 MR. BROWN: Yes, and I --

7 Right. Right. And, yes. With the recognition that
8 the special skills in Chapter 3 may apply to -- to one of
9 those sophisticated -- but, yes. We'd be arguing -- yeah.

09:49:17 10 I mean -- because with the interplay with Chapter 3 it
11 gets a little confusing so we don't want to say we're
12 jettisoning an argument for sophisticated laundering.

13 THE COURT: Look it, folks. I just need to
14 know what's been agreed upon. And -- and it was my
09:49:34 15 understanding that you were only going to advocate for a
16 two-level increase versus the four here, two in
17 paragraph 49, two in paragraph 51.

18 And I just need to know what the agreement was, and if
19 you want to speak privately, I would recommend you do that.

09:49:59 20 MR. BROWN: We'll advocate for two,
21 Your Honor. Yeah. Just for 49. We'll just advocate
22 for 49.

23 THE COURT: Okay. So paragraph 51, you are in
24 agreement with the defendants, that that would be changed to
09:50:14 25 a zero?

1 MR. BROWN: Yes. Your Honor, may I ask one
2 question, though?

3 THE COURT: Sure.

4 MR. BROWN: Can you include 2B(10) [sic],
09:50:23 5 which is relocation of criminal activity overseas to avoid
6 detection?

7 I didn't hear that in the calculation so far. I'm
8 sorry.

9 THE COURT: That's all right.

09:50:37 10 MR. BROWN: I'm standing up, Your Honor.

11 THE COURT: That's all right.

12 I am on paragraph 49.

13 MR. BROWN: Okay.

14 THE COURT: And I am using the language --

09:50:46 15 MR. BROWN: Okay.

16 THE COURT: -- in paragraph 49.

17 Now, you, I believe, have used different terminology.

18 MR. BROWN: Okay. Very good. Thank you, Your
19 Honor.

09:50:59 20 THE COURT: In the e-mail that was sent to me
21 that was -- that defense counsel were copied on, so it was
22 not an ex parte communication, of course, but I believe you
23 used different language or terminology than that used in the
24 presentence report.

09:51:16 25 So I am going based on the presentence report.

1 MR. BROWN: Sentencing guidelines is my second
2 language, Your Honor, so I apologize. Thank you.

3 THE COURT: Overseas criminal conduct which is
4 what you reference in the e-mail, is really the
09:51:37 5 sophisticated means, which is in --

6 MR. BROWN: I understand, Your Honor. Yes. I
7 see. Right.

8 THE COURT: So we're on the same page, right?

9 MR. BROWN: Yes.

09:51:48 10 THE COURT: Okay. And, again, folks, I'm just
11 trying to figure out what's in dispute and what isn't in
12 dispute.

13 And I believe lastly, role in the offense is being
14 disputed. It's the Government's position that the four
09:52:10 15 levels should be added. It is the defendant's position that
16 it not be afforded.

17 So, Mr. Brown, let me turn to you, sir.

18 Have I stated accurately what's in dispute and what's
19 not in dispute?

09:52:28 20 MR. BROWN: Yes, Your Honor.

21 THE COURT: Mr. Goldberg.

22 MR. GOLDBERG: You have, Your Honor. Just to
23 reiterate -- and I'm sure you covered this -- with regard to
24 the enhancement, under 2B (11), we have -- our original
09:52:50 25 brief didn't object to that enhancement, but we are

1 objecting to it now.

2 But other than that, yes, you have correctly stated
3 our position, what is agreed to and what is not.

4 THE COURT: I did state that.

09:53:01 5 MR. GOLDBERG: Thank you.

6 THE COURT: Mr. O'Shea.

7 MR. O'SHEA: Yes.

8 THE COURT: All right. Now, it's my
9 understanding that the Government wants to present testimony
09:53:15 10 here today as to some or all of the objections.

11 And it's also my understanding that the testimony
12 does, in fact, relate to both defendants.

13 So at this time I think it's wise that we hear
14 testimony. Following the testimony, we will then go over
09:53:37 15 every objection, and if there's further argument, I will
16 listen.

17 But I want to remind everyone that I have read
18 everything. But I will entertain further argument.

19 I will then make a ruling and then we'll proceed to
09:54:01 20 the actual appropriate sentence.

21 And when I go over the objections, I will begin with
22 Mr. Nicolescu, and when I've concluded with those
23 objections, I will then go to Mr. Miclaus's.

24 So on behalf of the Government.

09:54:20 25 MR. BROWN: Thank you, Your Honor. On behalf

1 of the Government we would call Special Agent
2 Ryan Macfarlane.

3 THE COURT: Please step up here, sir.

4 Please raise your right hand.

09:54:24 5 G. RYAN MACFARLANE,
6 of lawful age, a witness called by the Government,
7 being first duly sworn, was examined
8 and testified as follows:

9 THE COURT: Please take a seat, sir.

09:55:34 10 MR. BROWN: Thank you, Your Honor.

11 THE COURT: Thank you.

12 DIRECT EXAMINATION OF G. RYAN MACFARLANE

13 BY MR. BROWN:

14 Q. Special Agent Macfarlane, what I'd like to do is
09:55:40 15 basically focus the majority of my questions on evidence
16 that was used to create loss amount figures. Just to give
17 you sort of a roadmap.

18 Have you read the Government's sentencing memorandum?

19 A. I have, yes.

09:55:54 20 Q. So you're familiar with the -- sort of the pool of
21 numbers that we were looking to to factor loss amount?

22 A. Yes, I am.

23 Q. Okay. So let me walk you through each of those --
24 each of those groups of numbers.

09:56:08 25 The Government said that the eBay fraud was

1 approximately 3.5 to \$4.5 million. Do you remember
2 reviewing that number?

3 A. Yes.

4 Q. And based on that investigation, how did -- in fact,
09:56:19 5 were you part of the team that came up with that number?

6 A. I was, yes.

7 Q. And how -- what -- what evidence that you discovered
8 during your investigation is that 3.5 to \$4.5 million based
9 upon?

09:56:33 10 A. That information was based on information that we
11 found within the Bayrob databases that were contained within
12 search warrants.

13 It was then -- the data that was found on the search
14 warrants was then compared to a number of IC3 reports, which
09:56:52 15 is the Internet Crime Complaint Center.

16 And we took specific indicators that were associated
17 with the Bayrob Group, such as known e-mail accounts, known
18 money mules, known fax numbers and other technical
19 indicators that allowed us to identify complaints that were
09:57:13 20 related to the Bayrob Group, and we aggregated those
21 numbers.

22 Q. Okay. So is it fair to say that the 3.5 to 4.5 is a
23 reflection of actual observed transactions?

24 A. Yes.

09:57:28 25 Q. Does that include any sort of calculation that was

1 extrapolated from IC3 complaints?

2 A. The calculation was based -- well, there was no
3 additional calculation. It was based on the IC -- IC3
4 complaints that we were able to identify.

09:57:44 5 Q. Okay. And were those IC3 complaints relating to
6 completed eBay fraud?

7 A. Yes.

8 Q. So it wasn't just, My computer's running slow, I think
9 there's a problem with it, it's --

09:57:55 10 A. No. No. There were a number of IC3 complaints where
11 the -- you know, the loss numbers were not associated. They
12 just weren't realistic with -- with eBay -- or with the
13 activity that we had seen, and we discounted those
14 specific -- if we couldn't confirm that information, we
09:58:12 15 would discount it.

16 Q. And what sort of commonalities were you looking at
17 through the IC3 complaints?

18 A. As I previously mentioned, we were looking at e-mail
19 accounts that we had associated to the Bayrob Group, other
09:58:28 20 technical indicators such as fax numbers that were used by
21 the Bayrob Group.

22 I'm trying to think if there's additional -- and
23 primarily the money mules. Where the money was sent,
24 whether that was an identified Bayrob money mule or not.

09:58:49 25 Q. So -- so again, just looping back around, you

1 were -- and these money mules and these fax account numbers,
2 these were the mules and the faxes associated with money
3 mule accounts testified to in Court?

4 A. Correct. And then we would also make sure that the
09:59:05 5 actual complaint itself was consistent with the behavior of
6 the Bayrob eBay fraud operation.

7 So whether, you know, whether it was -- whether it was
8 the fact pattern matched what we had observed in the -- in
9 the fraud.

09:59:20 10 Q. Okay. So would -- would your testimony, based on your
11 research, based on your investigation that the 3.5 to 4.5,
12 is that a conservative estimate, is that exactly spot on, is
13 that, you know --

14 MR. GOLDBERG: Objection.

09:59:39 15 BY MR. BROWN:

16 Q. -- wildly -- well, based on how you tied it to your
17 investigation --

18 THE COURT: Overruled.

19 THE WITNESS: So I would believe that would be
09:59:45 20 a very conservative number and the reason I believe it's
21 conservative is because in a number of instances, I took the
22 data from the Bayrob Group in the databases that detailed
23 the victims that they had targeted.

24 And then I ran the full victim list that I found in
10:00:03 25 the Bayrob data against IC3 data to see what percentage of

1 victims that were in the database had actually reported the
2 fraud.

3 I also did this with the amount spreadsheet that was
4 sent between the two Bayrob members which detailed the
10:00:24 5 specific victims, where they were in the fraud stage, what
6 they had sent for the vehicles, and whether the money was
7 recovered by the Bayrob Group or not.

8 So it was a qualified list of Bayrob victims being
9 sent between two Bayrob Group members, and I found that on
10:00:42 10 both -- both accounts, approximately 30 to 35 percent of
11 the -- of the victims that were documented by the Bayrob
12 Group during their process was actually found within IC3.

13 So I believe that there is a -- it's very likely that
14 60 percent of the Bayrob victims did not report to IC3.

10:01:09 15 So I had both of those datasets, and I compared the
16 victim list compiled and tracked by the Bayrob Group with
17 the actual Internet Crime Complaint Center reporting. And
18 the report rate was -- was in the 30 to 35 percent range.

19 BY MR. BROWN:

10:01:24 20 Q. And based on your investigation, if it was
21 100 percent, approximately what would the loss amount value
22 be there?

23 MR. GOLDBERG: Objection.

24 THE COURT: Overruled.

10:01:33 25 THE WITNESS: So the loss -- the loss amount

1 from the eBay portion alone would be in the range of 10
2 to -- as high as 30 million.

3 It was tough for me to estimate that accurately
4 because of a number of different factors.

10:01:58 5 One of the factors was that the Bayrob Group
6 occasionally would -- would victimize the same victim twice.
7 So that number was not consistent. It was not always 7,000
8 to 10,000 or \$11,000.

9 Sometimes they would victimize a victim twice and by
10:02:20 10 saying that there was a problem with the initial transaction
11 and they would take a \$9,000 loss and turn it into a \$17,000
12 loss.

13 BY MR. BROWN:

14 Q. And, in fact, do you recall testimony from Mr. Savadra
10:02:33 15 about that?

16 A. Yes. And that that had occurred, and I believe we did
17 have people testify to that specifically.

18 Q. Now, do you recall also, going back to the sentencing
19 memorandum, a section about stolen credit cards found in the
10:02:49 20 database and other files within the community control
21 infrastructure?

22 A. Yes.

23 Q. Okay. Were you in fact the agent who identified
24 credit cards found in the databases and command and control
10:03:02 25 server?

1 A. I was, yeah.

2 Q. Generally, what does that mean when you say you found
3 them on the databases on the C&C?

4 A. So during my analysis I would find credit cards in
10:03:12 5 multiple different locations within the command and control
6 servers, as well as within Title 3 data.

7 For example, on the command -- the first command and
8 control server that I did a search warrant on had data that
9 was -- what I assessed to be data that was either acquired
10:03:32 10 or purchased or stolen from another source.

11 There was a file called 10,000 cards, which was a
12 compressed archive of credit card information.

13 I don't know the original source of this information,
14 but I did look through the file and found that it was -- you
10:03:50 15 know, it was credit card information consistent with most
16 other cases that we work in cybercrime that have, you know,
17 stolen credit card information.

18 Q. We'll talk about how they might have gotten them in
19 detail in a few minutes, but based on your investigation, is
10:04:06 20 it fair to say that they're in the business of buying and
21 selling credit cards?

22 A. Yes.

23 MR. GOLDBERG: Objection.

24 THE COURT: Overruled.

10:04:14 25 THE WITNESS: Yes, it was.

1 BY MR. BROWN:

2 Q. Now, did you also learn about stolen credit cards from
3 speaking with codefendant Danet?

4 A. I did.

10:04:26 5 Q. Do you recall what he told you about credit cards?

6 A. So Tiberiu Danet stated that they used credit cards to
7 procure their infrastructure, and I found on the command and
8 control server a table specifically for storing credit cards
9 that had been used by the group for obtaining and paying for
10 various services that were involved in their fraud.

11 Q. Do you recall if Mr. Danet told you a specific number
12 of credit cards he recognized as being stolen and used?

13 A. I think he mentioned in his proffer over 500.

14 Q. Now, about those tables, was there anything unique
10:05:05 15 about those tables that you saw in your investigation that
16 would delineate good credit cards, bad credit cards, active
17 credit cards, inactive?

18 A. So the table that contained the credit cards that were
19 being used for the Bayrob's infrastructure and other
10:05:20 20 services such as fax numbers and voiceover IP would have a
21 notes category and they would leave notes as to who was
22 using that credit card, what it was used for, and whether
23 that credit card was active or not.

24 And there was a -- if a card was dead or had been
10:05:38 25 cancelled there would be a term "mort" would be put next to

1 it.

2 Q. And did you learn through your investigation what mort
3 meant?

4 A. It means that the credit card was no longer active. I
10:05:54 5 believe it's like a shortened Romanian for dead.

6 Q. And in fact, in your experience and training and your
7 investigation, is it common to find a table like that in a
8 scheme like this?

9 A. I have seen tables like this in other cases where we
10:06:13 10 have sophisticated cyber criminals that are tracking a
11 number of elements related to their -- their criminal
12 operations.

13 So it is not necessarily unusual for them to track
14 their credit cards that they have, what they're being used
10:06:28 15 for, who within the group is using it, but usually we only
16 find that within groups that are well organized and pretty
17 sophisticated.

18 Q. Could you tell if the program that was tracking it was
19 a commercially available program?

10:06:44 20 A. It was a -- it was a standard database system that was
21 -- was used to track both the credit card information as
22 well as all the other different elements of the Bayrob
23 Group's operations.

24 Q. Could you tell if it was created within the Bayrob
10:06:55 25 Group or was --

1 A. No. The software itself would have been downloaded
2 but it would have been highly customized by the Bayrob Group
3 for this specific purpose.

4 So the entire structure of the tables and all the
10:07:10 5 fields within them would have been designed and, you know,
6 populated by the Bayrob Group and were integral to the rest
7 of the programming and code that the Bayrob Group used to
8 operate.

9 Q. Now, turning to another section.

10:07:33 10 You provided evidence and investigative, I guess,
11 results about stolen credentials to help formulate a loss
12 value.

13 What -- what did you find in terms of stolen
14 credentials on the databases and in the command and control
10:07:50 15 server?

16 A. So the databases on the command and control server had
17 a large number of stolen credentials and this was a main --
18 one of the main components of the Bayrob Trojan was to
19 collect account credentials for multiple different accounts,
10:08:10 20 such as e-mail -- e-mail accounts like Gmail, Hotmail,
21 Yahoo, Paypal accounts, Dropbox accounts, and -- and other
22 accounts that were -- were valuable to them.

23 Q. Now, when you're talking about credentials, you're
24 talking -- that's not the same as a credit card number,
10:08:32 25 right?

1 A. Correct. That would be a user name and a password to
2 access a system like eBay. And eBay was another account
3 that they would -- they would sometimes --

10:08:43

4 Q. Based on your investigation, how would they monetize
5 the credentials?

6 A. So the Bayrob Group was a vendor on AlphaBay, which is
7 a dark market that caters to other cyber criminals.

10:09:02

8 So they were -- they had a store on AlphaBay where
9 they advertised goods such as sniffed credit cards that were
10 100 percent working, is -- is what their advisement was.

11 And they would have -- they would sell those for
12 different values based on the type of card or the time
13 period they were selling them. Anywhere from, I believe,
14 5.99 to 35 or \$36 per card.

10:09:21

15 And those cards would -- were available for other
16 cyber criminals to purchase so that they could do criminal
17 activity using somebody else's credit card information.

10:09:40

18 And it was, as I said, being done on AlphaBay, which
19 was -- at the time, was one of the biggest criminal dark
20 markets on the Internet before the FBI took that -- took
21 that down with the assistance of another -- a number of
22 other agencies.

23 Q. Were they selling any other services based on their
24 criminal activity on AlphaBay?

10:09:55

25 A. They were also selling the infected systems themselves

1 as proxies to other cyber criminals so that they could hide
2 their location.

3 Q. And could you tell if they had any buyers, if there
4 were any actual transactions?

10:10:10 5 A. Yes. On AlphaBay itself it will tell you how many
6 transactions that that vendor has done and specifically what
7 their -- their customer service rating is, you know.

8 So you can -- you can give, you know, a vendor a
9 five-star rating based on the quality of their product and
10:10:29 10 their customer service.

11 So the AlphaBay profile for the Bayrob Group's store
12 had, I believe, over 500 transactions, and had a very good
13 rating.

14 Q. Okay. Now, is this part and parcel of the buying and
10:10:53 15 selling of credit cards you talked about earlier in one of
16 the loss calculations of 10,000 cards?

17 A. It is. It is, yes. So the 10,000 cards was -- was
18 cards they had when my role in the investigation began.

19 When I came upon that command and control server,
10:11:14 20 those 10,000 cards were already there.

21 I believe those cards were -- were purchased from some
22 other location, just based on the way they were packaged on
23 the server. But I don't know. I don't know the exact
24 source of those cards.

10:11:28 25 What I do know is I do know that they were using a --

1 like over 800 cards that were well documented within the
2 Bayrob database for services to further their criminal
3 activity at places like Yahoo small businesses to purchase
4 domains, DreamHost and Bluehost to purchase server
10:11:54 5 infrastructure, places like RapidFAX to -- to acquire a fax
6 number so victims could send in confirmations of their
7 eBay -- eBay wire payments for their vehicles that they
8 never received.

9 Those were -- those were well documented and there
10:12:12 10 were over 800 of those in the database that I observed.

11 And then there were a larger -- a much larger number
12 of credit cards that were collected from victims during this
13 process as well.

14 At the very end of the -- before they were arrested,
10:12:33 15 they were actually replacing the web browser on a portion of
16 the infected systems, and everything that that web browser
17 would send to sites on the Internet would be collected and
18 within that, that was how they were mining credit card
19 information as well as account information to be sold on --
10:12:58 20 on AlphaBay.

21 Q. Let's back up here just a minute, because
22 that's -- it's barely 10:00 and that -- that had a lot of
23 information there.

24 You said they were replacing web browsers. What --
10:13:13 25 what does that mean?

1 A. So on infected systems they had complete control over
2 that system. They could install software that they wanted
3 to install. They would install multiple different plug-ins,
4 depending on what they wanted that system to do.

10:13:27 5 What they could also do is they could also replace the
6 underlying software that was the web browser on that system,
7 and everything that that -- everything that was done over
8 that web browser would then get sent to at least one system
9 in North Carolina.

10:13:46 10 And that system in North Carolina had effectively a
11 large -- a large amount of storage, and that storage would
12 hold all of this web traffic from all these infected
13 victims. And then the -- from a criminal standpoint, the
14 beauty of that was that it was all the data.

10:14:09 15 And I could pull -- I could go back and re-mine that
16 over and over again.

17 So I could pull credit card information out of it but
18 I could also pull banking credentials out of it.

19 Q. Okay. So is it fair to say based on that that the
10:14:22 20 infected web browser would collect every web page an
21 infected user went to?

22 So if I went -- if I was infected and I went to
23 espn.com, I went to my bank, I went to, you know, a place
24 I -- car payment, I go to cleveland.com, whatever, all of
10:14:41 25 that traffic is stored?

1 A. All of the traffic that you were providing to those
2 sites was stored.

3 Q. So I go to my cleveland.com, if I click on an article
4 it would show the traffic of me clicking on the article,
10:14:54 5 correct?

6 A. It would show the -- so if you -- if you
7 were -- unfortunately, this is -- this is where things get a
8 little technical.

9 Q. Okay. Let me make it easy. If I type in my password
10:15:05 10 to my bank account, would it collect that?

11 A. Yes.

12 Q. If I typed in my account to Facebook, would it collect
13 that?

14 A. Yes. Any data that you were providing up to a site,
10:15:16 15 that would -- that was the focus of what was being
16 collected.

17 Q. And is that the type of data that they were monetizing
18 in your -- that you saw on AlphaBay?

19 A. Yes.

10:15:23 20 Q. For sale?

21 A. Yes.

22 Q. And when you say "re-mining old data," is that -- is
23 that in laymen's terms being able to go back into collected
24 information and pull out information of value that could be
10:15:39 25 monetized?

1 A. Yes.

2 So in reviewing the code that was responsible for
3 mining the data, I could see what they were mining within
4 that code.

10:15:52 5 So they were pulling out account credentials for a
6 number of different services primarily related to e-mail,
7 some file sharing was the bulk of their initial collection.

8 However, in reviewing and analyzing the data, you
9 could see the process was evolving. I could see that they
10:16:15 10 were -- they were adding in -- within some of their code
11 they actually had something called a study URL, which was
12 used to pull data for the next -- the next type of data item
13 that they were interested in pulling out.

14 When we arrested them, the study URL actually was for
10:16:33 15 Bank of America. So they were pulling out Bank of America
16 accounts. They had already pulled out Wells Fargo accounts.

17 So they were -- they were evolving from doing, you
18 know, traditional e-mail accounts and Paypal accounts and
19 eBay accounts to moving into bank accounts at the time they
10:16:53 20 were being arrested.

21 Q. And if that had gone on, would that increase the loss
22 amount realized by the Bayrob Group or would it keep it
23 about the same?

24 MR. GOLDBERG: Objection.

10:17:06 25 THE COURT: Overruled.

1 THE WITNESS: I believe it would have provided
2 them another revenue stream from the data they were already
3 collecting.

4 So I don't know whether the Bayrob Group was planning
10:17:16 5 on using those accounts themselves or selling those accounts
6 to other cyber criminals. Either of those is concerning.

7 However, they would have the option to do either of
8 them. They could -- it's very common on the dark markets to
9 sell bank account login credentials because of their value.

10:17:34 10 BY MR. BROWN:

11 Q. Now, when you sell something on AlphaBay like that,
12 login credentials, can you sell them to multiple people?

13 A. You can. As a criminal, you can sell them to multiple
14 people, but it will -- it's not wise to, because the
10:17:53 15 criminal marketplaces are based on rating.

16 And what will happen if you sell the same accounts to
17 multiple people and the first person is able to use that
18 account and it gets suspended and then you sell it to a
19 second person, they go and they use it and the account --
10:18:09 20 the account doesn't work, it's been suspended, then your
21 rating will suffer from that.

22 And cyber criminals on this dark markets, really their
23 rating itself is what is -- is one of the most valuable
24 aspects. Because nobody is going to buy from you if you're
10:18:24 25 a three-star vendor on AlphaBay, right? If you've got a

1 five-star rating on AlphaBay, you're going to have a lot of
2 business.

3 So it's -- it's very customer service centric, and
4 it's important that you deliver on the products that you're
10:18:40 5 providing.

6 Q. So is it fair to say that the market drives vendors to
7 continually add new valid credentials?

8 A. Yes. I mean, that's the very -- the basic business
9 nature of the dark markets is that credentials have a shelf
10:18:56 10 life and you can use them for whatever criminal purpose you
11 want to use them for, but eventually they're going to
12 expire.

13 And the same is true of credit card information as
14 well. Sooner or later those credit cards will be discovered
10:19:09 15 as being used for fraud.

16 Q. Based on your investigation of what you described as
17 the Bayrob evolution from going through just spam to mining
18 collected data, based on your investigation did it appear
19 that the Bayrob Group was developing tools and databases to
10:19:24 20 meet that growing demand?

21 A. Yes.

22 Q. And was it creating -- were the tools able to provide
23 increased -- increased credentials, credit card numbers,
24 from -- from single victims and multiple victims?

10:19:45 25 A. Yes. There were a number of victims that I -- both

1 their process supported growing their available dataset that
2 could be mined for credentials as well as the way in which
3 they targeted effectively landed them on systems that would
4 have access to more and more credit card information.

10:20:06 5 For example, I remember one specific infected system,
6 which based on my analysis was a hotel in Europe, and that
7 system was responsible for processing credit card payments.

8 So that specific system, for example, was providing
9 multiple different credit card numbers on a pretty
10:20:28 10 consistent basis, right? It wasn't -- it wasn't, you know,
11 my computer, your computer. It was a business computer that
12 was processing credit card information.

13 So not only did it get the -- you know, it -- it was
14 victimizing multiple people. As they visited the hotel,
10:20:47 15 their credit card information would have been stolen and
16 then it could be sold or used.

17 Q. Okay. So when you say -- or you provided a lot of the
18 credential information, credit card information for our --
19 for our memorandum; is that correct?

10:21:01 20 A. I did, yes.

21 Q. So when you provided a number of credit cards of
22 25,000 stolen credit cards on the database, was that a
23 conservative estimate?

24 A. That 25,000 credit cards was a -- was the combination
10:21:16 25 of the credit cards that I observed on the command and

1 control server, the credit cards that I knew the Bayrob
2 Group had used that were documented by the Bayrob Group for
3 the various services that they had procured, or the cards
4 that were in the database that tracked what was sold on
10:21:35 5 AlphaBay.

6 So it was a combination of all three of those
7 different categories.

8 And if we were to break those down, it would be 10,000
9 from the initial review of the search warrant, just under a
10:21:50 10 thousand for the cards that were used by the Bayrob Group
11 itself, and then the remainder of that would have been cards
12 that were either in the database that tracked what had been
13 sold on AlphaBay or cards that had been collected already by
14 the various means that the Bayrob Group used, such as the
10:22:11 15 browser replacement technique.

16 Q. And is it your -- your belief based on your
17 investigation that at time of arrest, the Bayrob Group was
18 continuing to evolve?

19 A. Yes, it is.

10:22:23 20 Q. They weren't winding down?

21 A. No.

22 Q. They weren't comfortable in their niche?

23 A. No. They seemed to be -- to be moving into what I
24 would call sort of a criminal big data phase.

10:22:37 25 Q. Now, during your investigation, did you ever find any

1 evidence that specifically defendant Miclaus was involved in
2 the theft of cryptocurrencies? Let's back up.

3 Was he involved in the mining of cryptocurrencies?

4 A. So I believe he was aware of what was going on with
10:23:01 5 the Bayrob botnet and its mining of cryptocurrencies.

6 Open-source research identified that he was -- he had
7 made two different polls -- posts on social media account
8 that was inquiring to the status of ypool.net, which is a
9 cryptocurrency mining pool, effectively a way for lots of
10:23:30 10 different people to be involved in cryptocurrency and all
11 kind of share the benefit of their -- their work.

12 But the reason that was important was because the
13 Bayrob botnet itself was instructing infected systems to
14 download a cryptocurrency miner and to join that specific Y
10:23:52 15 pool, mining pool.

16 Q. So he was involved in the use of cryptomining on
17 infected systems?

18 A. Yes. He was aware of it. Whether he was writing the
19 code or not -- I don't think he was writing the code.

10:24:05 20 I think he was both aware of the fact that this was
21 what the Bayrob -- one of the revenue channels for the
22 Bayrob Group and was responsible for, you know, potentially
23 checking the status of how things were going as well as the
24 recovery of the money on the other end.

10:24:22 25 Q. So he was receiving a benefit from the cryptocurrency

1 mining on infected systems?

2 A. Yes.

3 MR. GOLDBERG: Objection.

4 THE COURT: Overruled.

10:24:33 5 BY MR. BROWN:

6 Q. Is that consistent with his behavior on the -- with
7 the eBay fraud?

8 A. His role within the eBay fraud was that he was -- he
9 was one of the prolific posters of auto auctions within
10:24:45 10 the -- within the eBay fraud period of the Bayrob Group.

11 So he was -- I think he had posted 947 different eBay
12 auctions that were documented within the Bayrob Group
13 database, and was responsible for the fraud workflow related
14 to those.

10:25:02 15 Q. And was there ever a time that you observed during
16 your investigation that he withdrew from the conspiracy or
17 was not an active participant in the conspiracy?

18 A. No.

19 Q. Was he an active participant the entire time of your
10:25:20 20 investigation?

21 A. Yes.

22 MR. BROWN: Your Honor, I think those are all
23 the questions I have at this time. Thank you.

24 THE COURT: Mr. Goldberg.

10:25:21 25 MR. GOLDBERG: Thank you, Your Honor.

1 CROSS-EXAMINATION OF G. RYAN MACFARLANE

2 BY MR. GOLDBERG:

3 Q. Good morning, Agent Macfarlane.

4 A. Good morning.

10:25:31 5 Q. Special Agent Macfarlane. I have a few questions.
6 Start with the AlphaBay information that you provided us
7 this morning.

8 AlphaBay, you indicated that FBI shut AlphaBay down at
9 some point, correct?

10:25:42 10 A. Yes. It was -- FBI was involved with a larger
11 coalition of law enforcement to shut down AlphaBay.

12 Q. And where was AlphaBay located? Where were the
13 criminals operating AlphaBay located?

14 A. So a number of the criminals that were running
10:25:58 15 AlphaBay are still unknown. So the one that was arrested
16 was located in Thailand.

17 THE COURT: I'm sorry?

18 THE WITNESS: Thailand.

19 BY MR. GOLDBERG:

10:26:07 20 Q. So AlphaBay was a worldwide structure for buying and
21 selling credentials?

22 A. So AlphaBay was a dark marketplace, a criminal
23 marketplace where you could buy and sell credit card
24 information, account credentials, drugs, guns, fake
10:26:26 25 passports, criminal services, tutorials, hack -- like

1 hacking for hire. It had a large product set.

2 Q. And would you agree with me that the credit cards and
3 account credentials that you were able to actually observe
4 the Bayrob Group market through AlphaBay, you aren't able to
10:26:57 5 determine the source of those credentials other than the
6 credentials themselves?

7 In other words, whether they're U.S.-based or
8 European-based, South American-based?

9 A. No. We did a number of online buys from the Bayrob
10:27:14 10 Group's AlphaBay vendor store and we were able to, using our
11 online covert employees, buy a number of credit cards.

12 We would then take those credit cards and I would run
13 those back through the databases that I had from the search
14 warrants and I could see that those cards were in there and
10:27:33 15 then I could run that back to the specific infected system
16 that those cards were stolen from.

17 So we did run a number of purchases through there and
18 then we also did buy a number of computer systems as proxies
19 as well and I could confirm that those systems were also in
10:27:52 20 the Bayrob Group database.

21 Q. But in terms of where the victims of those thefts were
22 located, could you determine whether they were U.S.-based or
23 in some other country or some other continent?

24 A. We specifically bought some Ohio-based victims so that
10:28:12 25 we would have the ability to talk to those victims and also

1 know that they were here in the Northern District of Ohio.

2 Q. Okay. So aside from what you purchased, you indicated
3 you can determine a number of the AlphaBay transactions
4 based on the ratings that were available for the Bayrob
10:28:37 5 Group as a seller, and you said numbers of transactions.

6 You don't have -- you don't have a dollar amount to go
7 with those transactions, correct?

8 A. That would be within the database.

9 Q. And -- but you can't state it here today?

10:28:51 10 A. Yeah. I don't have that number.

11 Q. You can't state the number of account credentials that
12 were actually marketed on AlphaBay that you observed here
13 today?

14 A. So -- well, for the account credentials specifically,
10:29:05 15 the account credentials were not on AlphaBay.

16 The credit cards and the systems to be used as proxies
17 were on AlphaBay.

18 Q. Okay. So when I say "account credentials," I'm
19 lumping everything together.

10:29:16 20 But, okay. Specific to credit cards numbers, can you
21 give a number associated with AlphaBay transactions that you
22 personally observed in the materials?

23 A. So I don't have the exact number for you. I knew that
24 that number was somewhere within the -- like 1500 to 2,000
10:29:43 25 specific credit cards that were sold based on my review of

1 the databases.

2 Q. Okay. But so you're making a gesture. You're
3 estimating?

4 A. I am, yes.

10:29:55 5 Q. You are estimating based on seeing specific
6 transactions that occurred, or looking in the database and
7 seeing specific data that was exchanged for money?

8 A. So within -- so when we did the search warrants on the
9 last few Bayrob command and control servers, they actually
10:30:15 10 had a separate series of tables that were related to their
11 vendor account on AlphaBay.

12 So they're -- on one of the servers itself, I found
13 the specific store related to their AlphaBay vendor. So
14 like it was CVV2 land was their vendor account on AlphaBay.
10:30:41 15 I actually found like a CVV2 land dataset on one of the
16 command and control servers.

17 And what they were doing is they were actually
18 tracking what they had sold over that store.

19 Q. Sold in terms of actual account numbers or what they
10:31:03 20 had sold in terms of actual revenue?

21 A. The credit cards that they had sold over that store.
22 And I believe they were actually tracking when specifically
23 it had sold and then what it had sold for.

24 Q. Okay. So you can give us a number then as to the
10:31:23 25 revenue that was generated from selling these credentials,

1 account numbers on AlphaBay?

2 A. I could do that. I could aggregate that data. Yes.

3 Q. So what do you -- what is that number?

4 A. I haven't done that.

10:31:37 5 Q. Okay. So but you said there were about 20-, 2,500?

6 A. It was -- it was somewhere within the 15 to 2,000
7 range, if I remember correctly.

8 Q. Okay. 1,500 to 2,000, and you indicated at 5.99 to
9 \$36 apiece?

10:31:52 10 A. Yes.

11 Q. I can't do the math of that. But that would have been
12 the money that was derived by the defendants in this case or
13 by the criminal conspiracy related to the AlphaBay sales?

14 A. That's correct.

10:32:07 15 Q. Okay.

16 A. Well, let me -- let me qualify that.

17 So that would be the -- it would depend a little bit
18 on how they were doing business.

19 So that was what they were tracking and I'm not

10:32:23 20 sure -- so there's a couple of different things that we see
21 happen over AlphaBay, which is usually cyber criminals will
22 do business over AlphaBay with individuals, other cyber
23 criminals for a while, and then once they are -- once they
24 are comfortable with that individual, they will sometimes
10:32:42 25 move off of AlphaBay for transactions.

1 So --

2 Q. But now you're speculating.

3 A. Well, this is based on other cases that I've seen.

4 It's very consistent, because then you don't have to pay

10:32:55 5 AlphaBay a percentage of your sales. It's more cost

6 effective.

7 So a number of -- it's pretty common practice within

8 dark market vendors to go off, you know, like off of

9 AlphaBay for transactions.

10:33:09 10 Q. Again, you're speculating as regards to the Bayrob

11 Group, though?

12 A. Yes, and I don't know whether they did that here or

13 not --

14 Q. Okay.

10:33:17 15 A. -- but --

16 Q. So I wasn't texting when I was using my phone just

17 now. I just did a quick math. 5.99 times 1,500 is 8,985.

18 Any reason to disagree with that?

19 A. I believe your math.

10:33:28 20 Q. Okay. And if we took the 2,000 times 36, which is

21 your high-end number, I get 72,000 total.

22 A. Okay.

23 Q. Somewhere between 9,000 and 72,000 for AlphaBay

24 activity. And you would agree with me that you just

10:33:50 25 testified -- obviously, you just testified that eBay fraud

1 was -- could have been somewhere up to \$30 million?

2 A. That's correct.

3 Q. Okay. All right.

4 The AlphaBay fraud time frame, were you able to

10:34:05 5 determine what that was in examining these databases and

6 servers?

7 A. I could tell you. And I apologize. I don't remember

8 exactly when -- because the AlphaBay vendor profile will

9 actually, like, have when that vendor started on AlphaBay.

10:34:25 10 I want to say they opened up that account in 2016.

11 Q. Okay. And by that time, the eBay portion of -- of the

12 Bayrob Group activity was winded down?

13 A. It was -- it had stopped.

14 Q. It had stopped?

10:34:41 15 A. It had stopped, yes.

16 Q. Okay. And you also mentioned you're relying somewhat

17 on the reviews by other people on -- that used them as a

18 vendor, used the Bayrob Group as a vendor on AlphaBay?

19 A. You can see the reviews of every transaction that

10:35:00 20 they've done where somebody has left like a -- has rated

21 them and left a review. So --

22 Q. Is there -- is there any difference on how you leave a

23 review on AlphaBay as opposed to eBay?

24 A. Other than the content of the review?

10:35:18 25 Q. Right.

1 A. No. It's a very -- very similar process.

2 Q. Okay. So you would agree with me that part of the

3 eBay scheme that we've heard was the creation of false

4 reviews by eBay, by the Bayrob Group in order to lull

10:35:33 5 various victims and other people that were observing these

6 buyers and sellers, correct?

7 A. Yes.

8 Q. So based on this same group doing that activity,

9 which, I think, was proven at trial, you could assume or at

10:35:51 10 least would it be reasonable for me to say that some of

11 these or all of these reviews could have been fabricated by

12 the Bayrob Group to make them look more attractive as a

13 vendor on AlphaBay?

14 A. No. Because there's a significant technical

10:36:04 15 difference that I think --

16 Q. Well, that's what I was asking before.

17 A. So -- yeah. So the -- if you were to look at the

18 reviews that were related to the eBay accounts that were

19 operated by the Bayrob Group, that was -- those reviews were

10:36:22 20 actually -- they were populated because the Bayrob Group

21 could have control over that system and could control how

22 that system viewed the eBay website. So they were injecting

23 those reviews --

24 Q. Understood.

10:36:39 25 A. -- into that eBay session.

1 When I view the AlphaBay reviews and the page related
2 to that vendor, what I'm viewing is I'm viewing those
3 reviews that were left on the AlphaBay site itself.

4 Q. Okay. Fair enough.

10:36:56 5 So the long and short of it is, the injection of a
6 review is different from -- you know that you're not viewing
7 an injected review on AlphaBay?

8 A. I would assume my system was not compromised in
9 showing me, you know, fabricated AlphaBay reviews for this
10:37:16 10 vendor.

11 Q. Just one more question on this.

12 Do you know that the Bayrob Group used fabricated
13 reviews in other parts of their activity, correct?

14 A. Correct.

10:37:27 15 Q. And you don't know whether or not any or all of the
16 AlphaBay reviews for the Bayrob vendor were
17 legitimate -- were genuine or not, do you?

18 A. I would assess that those reviews were legitimate
19 based on my understanding of AlphaBay, based on we -- our
10:37:51 20 seizing of that server.

21 So although this is a different case, we have some of
22 the back end database information for the AlphaBay servers,
23 so we can see the activity behind that.

24 And I was able to confirm with the case agents that
10:38:10 25 had the AlphaBay case, that, you know, CVV2 land was on that

1 and that their -- the data was in the AlphaBay server and it
2 was consistent with the other data that was there.

3 I have no indication that those were injected or -- or
4 created falsely in any way, nor has that arisen in the
10:38:33 5 AlphaBay case, to my knowledge.

6 Q. Okay. I'm going to move off of that and go to
7 something else.

8 Toward the beginning of your testimony in estimating
9 the loss from eBay, a portion of this fraud, you said that
10:38:49 10 you compared IC3 reports and extrapolated out a number from
11 those, correct?

12 A. So I compared -- what we did is we identified IC3
13 complaints that were tied to the Bayrob Group's activity and
14 then we aggregated that loss amount.

10:39:10 15 Q. Okay. But those are reports -- those victims in those
16 reports, they weren't each interviewed, the circumstances
17 weren't verified. These are just reports that were filed
18 online, correct?

19 A. Some of the reports were just filed online. Some of
10:39:26 20 those reports, we actually did reach out and interview those
21 individuals and some of those -- some of those individuals
22 testified at trial.

23 Q. Correct. And have you seen all the victim impact
24 statements that were provided to the probation department
10:39:38 25 and to the defense as part of the -- as part of the

1 sentencing portion of this case?

2 A. I believe I've reviewed a large portion of them, yes.

3 Q. Okay. And you would agree with me that the -- at
4 least the victim impact statements total amount of loss --
10:39:53 5 my math could be off on this too -- is about \$550,000,
6 correct?

7 A. Yeah. I don't -- I don't have that number in front of
8 me, but I believe you, yes.

9 Q. So now turning your attention to Bogdan Antonovich,
10:40:11 10 who was the European money mule master who was a cooperating
11 witness in this case, correct?

12 A. Correct.

13 Q. And he had proffered and given information to the
14 Government about his activities in Europe in getting the
10:40:23 15 funds that were wired by the transfer agents in the
16 United States to Europe in order to be provided back to the
17 defendants, correct?

18 A. Correct.

19 Q. And the amount of funds that were transferred in that
10:40:34 20 manner was totalled out to be somewhere in the area of
21 \$1.1 million over the course of the eBay portion of this
22 scheme, correct?

23 A. I believe that was what he testified to, yes.

24 Q. The \$1.1 million is what we know was sent overseas,
10:40:53 25 correct?

1 A. Correct.

2 Q. And --

3 A. Well, no. Let me.

4 \$1.1 million is not what I knew was sent over

10:41:03 5 overseas. That was what he was responsible for, based on
6 his testimony.

7 Q. Well, do you have any evidence that there was any
8 other European money mule that would have obtained funds on
9 behalf of eBay on the Bayrob Group?

10:41:18 10 A. Antonovich was not their only money mule.

11 Q. Well, who else did this activity?

12 A. There were other individuals that were related to
13 money muling.

14 Q. And do you have numbers related to their -- dollar
10:41:31 15 numbers related to their activity?

16 A. I don't, because they were not forthcoming with that
17 information.

18 Q. Okay. So if we had a number -- the only evidence that
19 we have of money actually wired overseas came from
10:41:46 20 Antonovich, and that was 1.1 million, in terms of a total
21 amount?

22 A. For Antonovich's part --

23 Q. Correct.

24 A. -- we identified through Western Union as well --

10:41:56 25 Q. Right.

1 A. -- additional wire transfers and through IC3
2 complaints, additional wire transfers, but we believe that
3 his role in the money muling was over a million dollars.

4 Q. I mean, going back to his role, you did go back and
10:42:14 5 look at the Western Union activity that he pointed out that
6 he was involved in, right?

7 A. We had the Western Union records for -- yeah, for
8 everything that we could identify related to a wire for
9 Bayrob.

10:42:27 10 Q. So you had no reason to believe after that part of the
11 investigation that the 1.1 million number is far off?

12 A. For Antonovich?

13 Q. Correct.

14 A. I think that would be -- essentially, yes, I believe
10:42:41 15 that may be an accurate number for what he was responsible
16 for.

17 Q. And with regard to use of credit cards, you said there
18 were about 800 that you found on the servers that were
19 actually used for infrastructure purposes?

10:42:58 20 A. Correct.

21 Q. And you said that Danet told you there were 500 but
22 you found that there were about 800?

23 A. That's correct.

24 Q. He underestimated or lied, one of the two?

10:43:08 25 A. What he recalled was there were 500.

1 Q. My recollection of the testimony in trial was that
2 there was about 100 -- in the neighborhood of \$100,000 total
3 used for infrastructure purposes from stolen credit card
4 numbers.

10:43:26 5 Would that be your understanding?

6 A. I don't believe that we did that calculation.

7 Q. Okay. So you don't have a number of -- from those 800
8 credit cards that were located by you as stolen, you don't
9 have a number of how much was actually spent?

10:43:45 10 A. No. We did not -- we did not calculate how much was
11 spent on those cards.

12 Q. Okay. With regard to the Cc 10000 database, you
13 indicate you were able to open and observe that database?

14 A. I was, yes.

10:44:05 15 Q. And it was -- was it a -- did it have addresses
16 associated with credit card numbers and personal -- other
17 personal information?

18 A. Yes. It had a very full dataset for each credit card
19 number.

10:44:20 20 Q. And those -- do we have a time frame as to when those
21 were -- let me ask you this.

22 Do we know when they were harvested? What country
23 they were harvested from? Who harvested them, and how they
24 got onto the server?

10:44:37 25 A. For the time frame question, if I am recalling

1 correctly, I believe those cards were in the 2012 to 2014
2 range, when observing the expiration dates of those cards,
3 that's on recollection, and I apologize for not being able
4 to say for sure that's the case, but that's what I recall.

10:45:11 5 As far as the location of those cards, I remember
6 seeing locations across the world to include the U.S.,
7 within that dataset. My assessment of how that data was
8 arrived on to that server was that it was transferred onto
9 that server, and that's based on the fact it was an archive
10:45:43 10 as opposed to within the database or within another location
11 that was actually being actively processed by the Bayrob
12 Group.

13 Q. Let me follow up on that. So, in other words, you
14 don't have evidence that Bayrob's group's activity actually
10:46:00 15 harvested those numbers but rather they were stored in a
16 file on one of the command control servers?

17 A. I don't think that the Bayrob Group harvested those
18 credit card numbers. I think they were in possession of
19 them and based on the format, I believe it was moved from
10:46:18 20 another location.

21 Q. Okay. And when did you -- do you have an idea -- what
22 year did you actually locate that database?

23 A. So that would have been in the 2013, 2014 time frame.

24 Q. Okay. And were you able to ascertain whether or not
10:46:43 25 any of those credit cards were ever used by Bayrob Group in

1 any part of their criminal scheme?

2 A. I was not, no.

3 Q. And would you agree that -- I think your testimony was
4 that by 2014 they were all expired?

10:46:56 5 A. As I said, I think it was a historic dataset of credit
6 card information acquired from another location.

7 Q. Okay.

8 MR. GOLDBERG: I have nothing further. Thank
9 you.

10:47:29 10 THE COURT: Mr. O'Shea.

11 MR. O'SHEA: Thank you.

12 CROSS-EXAMINATION OF G. RYAN MACFARLANE

13 BY MR. O'SHEA:

14 Q. Good morning, Agent Macfarlane.

10:47:44 15 A. Good morning.

16 Q. Now, as a preliminary matter, you're aware from your
17 knowledge of how the sentencing guidelines work, sir, that a
18 good portion of the sentence that these gentlemen, including
19 but not limited to my client, will depend on what the Court
10:48:01 20 comes up with as far as a loss, right?

21 A. That's correct.

22 MR. BROWN: Objection.

23 THE COURT: Overruled.

24 Again, folks, I'm going to remind everybody, it's not
10:48:12 25 trial.

1 MR. O'SHEA: Understood.

2 BY MR. O'SHEA:

3 Q. So you're here today to assist the Court, your
4 understanding, in trying to figure out what the loss amount
10:48:22 5 is, right?

6 A. I am, yes.

7 Q. Okay. And you agree with me that the loss amount that
8 you assert on behalf of the federal government has to be, to
9 some degree, reasonably accurate.

10:48:33 10 Am I right about that, sir?

11 A. Yes.

12 Q. Okay. Now, I read a presentence investigation report
13 back in July where the Government asserted a loss amount
14 according to, at least to the probation department, of 3.5
10:48:48 15 to \$4.5 million.

16 Are you aware of that?

17 A. I am.

18 Q. And then we have another one that comes out in
19 September, and that loss jumps somewhat exponentially to 9.5
10:49:02 20 to 25 million bucks, right?

21 A. I believe that was what it was in the last sentencing.

22 Q. Do you have any idea about why in July it was 3.5 and
23 now it's -- to 4.5 and how it jumped up in September to 9.5
24 to 25 million bucks?

10:49:22 25 Do you have any idea how that happened?

1 A. Well, I believe the initial sentencing document was
2 based off the indictment, and the numbers that we used for
3 the indictment were very conservative because we wanted to
4 be responsible, and it was what we could -- we could
10:49:35 5 effectively prove in court.

6 And the initial numbers came primarily from the eBay
7 portion of the Bayrob Group's activity alone. And the
8 additional losses are based on a more total look at what
9 they were doing is my understanding based on the
10:49:58 10 conversations and the data that I provided back to the U.S.
11 Attorney's Office.

12 Q. Because a big jump is in large part based upon this
13 credit card business.

14 Am I right about that?

10:50:08 15 A. Correct.

16 Q. Okay. That leads me -- and I think you indicated on
17 direct examination that what you're giving us here today is
18 just sort of an -- to use your words -- an estimate.

19 Am I right about that?

10:50:21 20 A. It is.

21 Q. All right. And that includes whether or not this
22 database is accurate or not.

23 Am I right about that?

24 A. The database is one of the core data sources, yes.

10:50:31 25 Q. Okay. But you're just assuming that the database is

1 accurate, right?

2 Is that fair?

3 A. Based on my review of the database, I am assuming that
4 the data within it is the data within it, yes.

10:50:43 5 Q. Okay. All right. Now, I think Mr. Goldberg went into
6 this a little bit, too.

7 There wasn't much follow-up that the federal
8 government did as it relates to this database and this
9 credit card business, notwithstanding the fact that this was
10:50:56 10 a ten-year investigation by my estimate, to find out whether
11 or not any loss whatsoever had been incurred by anyone or
12 any credit card number in that database, right?

13 A. I would disagree with that.

14 Q. Okay. Let me ask you this: In your years as an FBI
10:51:17 15 agent with this credit card fraud and financial fraud stuff,
16 you're aware of the Truth in Lending Act and how it protects
17 consumers from losses and the Federal Fair Credit Billing
18 Act?

19 You're aware of how that works, right?

10:51:32 20 A. I would say I am.

21 MR. BROWN: Objection, Your Honor.

22 THE COURT: Overruled.

23 I'm not sure where you're going with this, but for
24 now, I'll overrule it.

10:51:43 25 MR. O'SHEA: All right.

1 THE WITNESS: Generally --

2 THE COURT: It's not relevant.

3 THE WITNESS: Generally, yes.

4 BY MR. O'SHEA:

10:51:48 5 Q. All right. Now, you're aware, for instance, if
6 somebody suffers -- you've seen this. If somebody suffers a
7 credit card loss, they notify the credit card company within
8 a certain period of time, and they have to reverse the
9 charges so that the consumer has no loss.

10:51:58 10 Am I right about that?

11 A. Depending on how you -- yeah. From a financial
12 standpoint, if you catch those transactions, yes, and you go
13 to your credit card company, they will --

14 Q. They have to reverse it, right?

10:52:12 15 A. If you say so, they do. I'm not sure that they have
16 to. But, yes, they traditionally do.

17 MR. BROWN: I'm going to object to this. This
18 is also getting into --

19 BY MR. O'SHEA:

10:52:22 20 Q. All right. Let me follow up with another question.

21 Did you, during the course of preparing for today or
22 during this investigation, ever identify any of these people
23 in this database, these credit card numbers, whether anybody
24 had ever suffered an actual loss or had attempted to get any
10:52:44 25 type of restitution through these processes to have any loss

1 at all, sir?

2 MR. BROWN: Objection, Your Honor. That's
3 irrelevant to the calculation of loss amount.

4 MR. O'SHEA: Well, I don't know about that,
10:52:55 5 Judge. I --

6 THE COURT: Well, I do and I agree.

7 MR. O'SHEA: Okay. All right.

8 BY MR. O'SHEA:

9 Q. Well, let me ask you this: You don't know whether or
10:53:05 10 not any of those persons who are listed to those credit card
11 numbers, with some exceptions, I guess, ever suffered a loss
12 at all.

13 Am I right?

14 MR. BROWN: Objection again, Your Honor.

10:53:18 15 THE COURT: I'm not sure this is relevant, but
16 because it's the nature of this hearing; it's not trial,
17 it's sentencing.

18 Can you answer that, sir?

19 THE WITNESS: Sure.

10:53:29 20 We did talk to victims that we identified through
21 credit card -- so, for example, I'll give you a very
22 concrete example.

23 One of the guys that was used to pay for the -- one of
24 the command and control servers at DreamHost, I reached out
10:53:45 25 to that individual and I talked to him, and he was not aware

1 that his card was being used for DreamHost.

2 So, you know, depending on how closely you follow your
3 credit card bill, you can miss a 39 or \$49 charge. And he
4 had been paying his credit card bill.

10:54:03 5 I'm assuming that he went back to his bank and said,
6 Hey, listen. My credit card has been compromised. But if I
7 hadn't reached out to him and said, Hey, listen, you know,
8 are you currently running a server at DreamHost, and he
9 said, No, I'm not, and I said, You need to check your credit
10:54:21 10 card bill because you're getting charged for it, he would
11 have continued to pay his credit card bill.

12 BY MR. O'SHEA:

13 Q. Follow up. Two questions: One, that's one person you
14 identified, and two, you used the word "if," if, but you're
10:54:34 15 not sure, absent your intervention, whether he would have
16 suffered any loss at all, right?

17 A. I think he would have continued to pay his credit card
18 bill and suffered loss. I'm not sure if he would have
19 caught it or not. I don't know. And so there's a lot of
10:54:51 20 ifs there.

21 Q. You're not willing to concede this morning that part
22 of your loss that you're trying to assert here involves
23 speculation?

24 MR. BROWN: Your Honor, objection to the --

10:55:02 25 THE COURT: Sustained.

1 MR. O'SHEA: Let me move on.

2 BY MR. O'SHEA:

3 Q. Now, I think one of the questions that Mr. Brown asked
4 you at the conclusion of the direct examination was, was
10:55:15 5 Mr. Miclaus aware of what was going on.

6 Do you remember that question?

7 A. Yes.

8 Q. Okay. Now, there were a bunch of people that
9 testified in this case, I'll call them collectively these
10:55:25 10 Romanian witnesses that you flew over here during trial, and
11 Mr. Danet.

12 They were more than just aware of what was going on,
13 right?

14 A. Yes, they were involved.

10:55:36 15 Q. Okay. And you're not aware, yourself, sir, of whether
16 or not Mr. Miclaus was writing any code.

17 I think that was one of the questions that Mr. Brown
18 brought up, right?

19 A. I don't -- I don't have any code that I can
10:55:55 20 specifically attribute to Miclaus, no.

21 Q. Okay. And the nickname that Mr. Nicolescu gave
22 himself was what?

23 A. MasterFraud.

24 MR. O'SHEA: Okay. Nothing further, Judge.

10:56:21 25 THE COURT: Mr. Brown.

1 MR. BROWN: Yes, Your Honor, I don't have any
2 further questions. I think everything has been asked and
3 answered that we need for close.

4 THE COURT: You may step down, sir.

10:56:56 5 On behalf of the Government are there any other
6 witnesses?

7 MR. BROWN: No, Your Honor.

8 THE COURT: I'm assuming no witnesses,
9 Mr. Goldberg?

10:57:01 10 MR. GOLDBERG: That is correct, Your Honor.

11 THE COURT: And Mr. O'Shea.

12 MR. O'SHEA: Correct, Your Honor.

13 THE COURT: Why don't we take a very short
14 recess then.

10:57:07 15 - - -

16 (Proceedings in recess at 10:57 a.m.)

17 THE COURT: Please be seated.

18 In that the loss issue is common to both defendants, I
19 will hear from everyone on this issue.

11:17:00 20 Following the loss issue, I will simply go over the
21 objections by Mr. Nicolescu, and after we have resolved
22 those, I will then go over the objections of Mr. Miclaus,
23 certainly understanding that there might be some
24 overlapping.

11:17:17 25 But let's address the loss issue as to both defendants

1 at the outset.

2 Any objection to that?

3 MR. GOLDBERG: No, Your Honor.

4 MR. BROWN: No, Your Honor.

11:17:29 5 MR. O'SHEA: No, Your Honor.

6 THE COURT: All right. Because the Government
7 is objecting to the additional 20 levels, as well as the
8 defendants, I'm going to call on you first, Mr. Brown --

9 MR. BROWN: Okay.

11:17:45 10 THE COURT: -- to address the loss issue.

11 MR. BROWN: Thank you. And this is just loss?

12 THE COURT: Just loss.

13 MR. BROWN: The other 18 pages will come
14 later.

11:17:54 15 Your Honor, thank you very much.

16 The constant theme -- and although we're just talking
17 about loss right now, but the constant theme here is really
18 not just the sentencing guidelines in a vacuum, but the
19 sentencing guidelines sort of hand in hand with the 3553
11:18:13 20 considerations.

21 Because unlike many sentencings, the 3553(a) can be
22 imposed very needfully on the sentencing guidelines as we go
23 through step by step, rather than just at the end as a
24 whole.

11:18:29 25 Because with the length and complexity and

1 sophistication and the evolution of this scheme, those
2 considerations should be compared with the guidelines at
3 every step.

4 This isn't just a code. This isn't just 7 plus 20
11:18:49 5 plus whatever, whatever, and you get a number and then you
6 move on to the -- there is sort of a conversation between
7 the needs of justice and the guidelines as they're set out.

8 And, you know, that is what is the idea of the system
9 of justice. It's not just mathematics, it's a system.

11:19:06 10 And it's especially important because --

11 THE COURT: But we get to that after we come
12 up with --

13 MR. BROWN: Absolutely. Right.

14 THE COURT: It's my obligation to make a
11:19:16 15 determination of what the appropriate numbers are.

16 MR. BROWN: Right. And --

17 THE COURT: And then only after that do I take
18 a look at the full picture to determine in the interest of
19 justice what the appropriate sentence is.

11:19:27 20 So, unfortunately, I need to go through this exercise.

21 MR. BROWN: No, and I'm not asking you to not
22 do that.

23 I'm saying that as the Government went through this,
24 and all of our arguments are, we're looking at based on the
11:19:41 25 behavior, the defendants, based on what they did and what

1 they were planning to do and able to do, they're facing very
2 severe justice, and deservedly so.

3 But -- so we'll go right into the loss amount, which
4 is what Special Agent Macfarlane -- yeah.

11:20:00 5 THE COURT: Please confine your comments for
6 now to whether I should add 16 to the 7 or 18 to the 7.

7 MR. BROWN: Yes. And, Your Honor, the
8 Government would argue it's 18. And 18, if anything, it is
9 the definite number, loss amount number that the Government
11:20:21 10 could prove.

11 You know, the 3.5 to 4.5 million in eBay loss the
12 Government contends is well supported, if not, again,
13 under-representative of the actual loss of 100 percent of
14 the victims.

11:20:33 15 But of the one third who could be tied to database
16 numbers and IC3 complaints, as Special Agent Macfarlane just
17 testified to, that 3.5 to 4.5 million number is very
18 demonstrable, it's very concrete, it's very provable.

19 The Government's -- since Mr. O'Shea brought it up,
11:20:52 20 the Government's additional numbers were based on, quite
21 appropriately so, intended loss and also other investigative
22 techniques.

23 The Government would point out that that 10,000 card
24 table, setting aside the 500 to 800 cards that were actually
11:21:06 25 seen in the database, and the Government would conclude that

1 the database is not floating in the ether or somewhere on
2 the Internet.

3 The database was taken from the command and control
4 server. The command and control server was the domain of
11:21:20 5 the defendants. The numbers that were created and existed
6 on that database were created and maintained by the
7 defendants.

8 If -- it was not a database created by Special Agent
9 Macfarlane. It was not a database created by the users of
11:21:37 10 Facebook who were looking at the evidence.

11 Those were the defendants's numbers. They possessed
12 those credit card numbers, they possessed the information on
13 that database. That's accurate.

14 That's why Special Agent Macfarlane could say these
11:21:49 15 10,000 cards were in the possession of the defendant.

16 And to argue about the speculative value of those
17 numbers, the guidelines has a solution for that, which is if
18 you cannot find the value of a credit card, you say it's
19 worth \$500.

11:22:05 20 So if you look at just that 10,000 -- set aside eBay.
21 If you look at that 10,000, putting aside the thousand that
22 Danet or Special Agent Macfarlane observed -- and that's,
23 again, being conservative and generous, a thousand -- that
24 9,000 times 500 is 4.5 million.

11:22:22 25 So you have 3.5 plus potentially 5.5, we're well

1 within that 18 range.

2 The reason eBay was discussed, too, Your Honor, and
3 why we felt comfortable in our brief writing 20 but were
4 also willing to argue 18 -- and this is going back to my
11:22:40 5 preamble -- is AlphaBay is the crowning achievement of what
6 we knew about the Bayrob Group at time of arrest.

7 This is what they were evolving into, which was big
8 data mining to exploit over time and over victim multiple
9 credentials, credit card information, and other data that
11:22:59 10 they could go back to a victim multiple times and get
11 credentials to sell, which enriches them.

12 But then also to use maybe for their support system or
13 when we're assigning loss -- and this is where it is
14 speculative, but not impermissibly so -- if you sell a
11:23:18 15 credit card for \$50 on AlphaBay, that's a loss of \$50.

16 However, that credit card still is being exploited.
17 That could be another \$500. That could be another loss
18 amount.

19 And instead of -- you know, quite frankly, the loss
11:23:34 20 amount calculations could get grotesque. It's a very crude
21 method of really framing the harm of the loss.

22 Because dollar loss is a loss but there's also a great
23 harm with what they evolved into.

24 So 18 is the Government's argument. Very fair and
11:23:53 25 indicative of provable numbers but also, when you take a

1 step back and look at that 18, it shows a continuing and
2 evolving harm that will be addressed further in the
3 guidelines and also in our argument.

4 Thank you.

11:24:07 5 THE COURT: Mr. Goldberg.

6 MR. GOLDBERG: Thank you, Your Honor.

7 Very briefly, because I did address this in my
8 sentencing memoranda --

9 THE COURT: And I want to assure everyone I
11:24:17 10 have read everything submitted in great detail multiple
11 times.

12 So go ahead.

13 MR. GOLDBERG: But I will point to the
14 testimony we heard this morning from Special Agent
11:24:27 15 Macfarlane. We have a documented actual transfer of funds,
16 which I believe is the most accurate loss, one of the most
17 accurate loss indicators and something that should be given
18 great weight, of 1.1 million being transferred to the
19 defendants in Europe from the eBay scam portion of this
11:24:52 20 scheme.

21 You know, to say there were other money mules, we
22 don't have numbers for them and we don't know what it is.
23 Instead of speculating and saying, well, you know, we saw
24 all of these different transactions online and extrapolating
11:25:11 25 information from the referral forms to the FBI, let's look

1 at what we really have.

2 We have Sergeant Macfarlane -- Agent Macfarlane saying
3 1.1 million was the number. We have the victim impact
4 statements that come up with about 550,000 of that
11:25:33 5 1.1 million.

6 So there will be a difference between the victims that
7 come forward and the actual amount of money. So that's 1.1
8 million.

9 We add to that about \$100,000 -- and I believe that
11:25:46 10 this was testified to at trial -- in the use of those 800
11 credit cards to fund infrastructure. That would be an
12 amount that would be added to the 1.1 million and that would
13 be 1.2 million.

14 And then as we heard Special Agent Macfarlane also
11:26:05 15 testify, the AlphaBay loss, that is, the money realized from
16 that activity, was somewhere in the amount of 72,000 at
17 most, and that comes into place in a different part of my
18 argument.

19 But if you used -- if you add that, that's
11:26:30 20 1.27 million.

21 And then if you add in -- even if you replace that
22 number with \$500 per card for the 800 or so credit cards
23 actually used in the scheme, we had 400,000.

24 So that comes out to a total of well under \$2 million,
11:26:50 25 Your Honor, which is why we are arguing that the loss amount

1 should be placed in the 16 point range under subsection --
2 well, 2B1.1(b)(1)(i). More than 1.5 million, but under
3 3.5 million.

4 I would just point out, as I have in the brief, that
11:27:11 5 there is a lot of speculation about the nature of the credit
6 card numbers that were on the Cc 10000 database, where they
7 came from. They were never -- there's never any indication
8 that any of them were ever used.

9 They certainly weren't, according to Agent Macfarlane,
11:27:35 10 they weren't -- harvesting of that information wasn't the
11 result of any activity by the Bayrob Group. And to just
12 throw those 10,000 card numbers in at \$500 apiece, I think,
13 is speculative.

14 So while the Government gets up and says that, you
11:27:57 15 know, we're going to follow the guidelines, they're making
16 an argument about 3553 factors they start off with, which is
17 what they've done all along.

18 Bogdan Nicolescu is a bad guy, therefore, every
19 inference you could possibly make against them should be
11:28:18 20 made. That's what the Government just did until the Court
21 stopped it.

22 And that's what I'm asking the Court not to do in
23 determining loss. The loss that I've suggested accounts for
24 Mr. Nicolescu for the conspiracies activity in whole and I'd
11:28:34 25 ask you to adopt that number, Your Honor.

1 Thank you.

2 THE COURT: Mr. O'Shea.

3 MR. O'SHEA: Thank you, Your Honor. I think
4 I'll be a lot briefer.

11:28:41 5 The loss here, and just limiting our arguments, as I
6 think you want us to, just to the loss amount is so
7 speculative in -- just in the context of sentencing. I'm
8 hearing words like, I'm speculating, I'm assuming, I'm
9 estimating. That's coming from the Government, Your Honor.

11:29:03 10 And let me lay out this analogy for whatever value it
11 has. If the Government came to a bank and said, we want
12 \$2.5 million and we want you to loan us that money based
13 upon this estimation, this type of speculation, they
14 couldn't get a car loan based on this information, Judge,
11:29:22 15 they couldn't get a mortgage and they couldn't even get, to
16 use a word that we used a lot this morning, a credit card
17 account based upon this type of speculation.

18 And this type of speculation is what they want you to
19 use in determining loss as it relates to them. The burden
11:29:37 20 is on them. It's not up to Mr. Goldberg, myself, or any of
21 these two gentlemen to tell you what the loss is, Judge.
22 It's up to them.

23 And I'll leave you with this. I don't think they
24 could get a credit card loan, bank loan, car loan, any loan
11:29:51 25 based upon this level of speculation that they want you to

1 engage in in order to determine loss here.

2 THE COURT: Mr. Brown.

3 MR. BROWN: Good alphabet, Your Honor.

4 THE COURT: I'm sorry?

11:30:05 5 MR. BROWN: No, nothing, Your Honor.

6 Your Honor, the loss is not speculative, and we're not
7 just throwing up, casting aspersions because we don't like
8 the defendants.

9 The defendants were found guilty based on evidence
11:30:21 10 presented to the jury of 21 counts of money laundering, wire
11 fraud, aggravated identity theft, wire fraud, counterfeit
12 fraud, and computer fraud.

13 These defendants engaged in a series of behaviors that
14 resulted in both demonstrable and intended losses, and
11:30:40 15 that's what the Government is producing, they're basing
16 their numbers on.

17 The eBay fraud was not just pulled out of the air and
18 the reason that the Government used 3.5 to 4.5 as a base
19 from the very beginning was because at time of indictment,
11:30:55 20 that is what, based on our investigation, the most
21 conservative appropriate -- conservatively appropriate
22 number was.

23 We were not going to issue press releases. We were
24 not going to prosecute the case initially based on rampant
11:31:09 25 speculation.

1 Because of the amount of data we had already found
2 that the defendants had created, and the amount of data that
3 we had received pursuant to court process and also search
4 warrants, at time of arrest, the Government's position was
11:31:24 5 to responsibly and deliberately investigate everything.

6 So all of those numbers were defensible. The 3.5 to
7 4.5 is very defensible, as Special Agent Macfarlane spent
8 probably a good five to ten minutes talking about IC3, all
9 of those things, which would be paperwork that any bank in
11:31:44 10 the world would love to see if we're applying for a loan.

11 The increase in numbers with the large number of
12 credit card tables, with the AlphaBay activity, came because
13 when we -- when the Government continued their investigation
14 after time of indictment, that loss -- those numbers
11:32:02 15 supporting that loss amount was discovered within the
16 databases and within the behavior and the ongoing criminal
17 conduct of the defendants.

18 And it is entirely reasonable for the
19 Government -- for the Court to look at intended loss and the
11:32:16 20 type of evidence-based estimation that Special Agent
21 Macfarlane gave today, that it's not just, Well, if they
22 stole 3.5, they're going to steal 10 because 10 is a
23 round -- that wasn't it.

24 It was not only I looked at the IC3s, but then I also
11:32:38 25 went back and I looked at losses within the database. And

1 it looked to be our known amount was a third of what was in
2 the databases, which were the defendants' databases.

3 So it is a reasonable extrapolation. Say, one third
4 here, one -- you know, one third to fill out the unknown
11:32:56 5 there.

6 But that's why, again, we always start with our base
7 known number of 3.5 to 4.5 million, and then again we're not
8 engaging in wild speculation. I don't think in any of our
9 briefs we said credentials sold on AlphaBay were sold for X
11:33:14 10 and add on \$500 per credential or per credit card bill.

11 That would be speculative.

12 I think the Government could have been done that, but
13 we didn't because we would rather just show that that is
14 really understating the danger to that loss value.

11:33:31 15 Thank you, Your Honor.

16 THE COURT: I agree with the Government.
17 Agent Macfarlane's testimony alone satisfies the
18 Government's burden. The agent testified that looking at
19 eBay loss alone, the conservative number is 3.5 to 4.5.

11:33:57 20 The Court reminds everyone that an 18-level
21 adjustment, which is urged by the Government, the starting
22 point is 3.5 million.

23 So with the eBay loss alone, we are in the 18-level
24 adjustment.

11:34:16 25 Agent Macfarlane testified that the evidence

1 supporting his statement that the conservative eBay loss was
2 between 3.5 and 4.5 is based upon the spreadsheet which
3 Valentine Danet accidentally sent to his brother, Tiberiu.

4 Now, I know that was not specifically in the testimony
11:34:41 5 today, but the Court certainly recalls that that is evidence
6 and I do believe it was in the Government's sentencing
7 memorandum.

8 It's also based upon the IC3 complaints, and Agent
9 Macfarlane testified that those complaints represent about
11:34:58 10 one third of the victims. And it also comes from the
11 victims' statements.

12 So frankly, the Court doesn't even have to go further
13 beyond the eBay loss.

14 But, of course, we do have the second component, and
11:35:13 15 that being the credit card component, we'll call it. And
16 Mr. Brown is exactly correct that you take any number of the
17 credit cards and you multiply it by 500.

18 So most certainly we are above that 3.5 threshold.
19 And I feel compelled to comment on what I'm going to call
11:35:43 20 usability.

21 To the extent that either defendant is challenging the
22 fact that there is no evidence that the stolen credit cards
23 resulted in any actual loss to any victim, I reject that
24 argument.

11:35:57 25 The Sixth Circuit has consistently held that there is

1 no usability requirement for assessing loss under guideline
2 2B1.1.

3 Therefore, because there's been an agreement not to
4 use the 20-level increase, but to use either the 18 or
11:36:19 5 16-level increase, the Court is, in fact, giving the
6 18-level increase because the Government has met its burden
7 of proof on this issue.

8 The defendants -- both defendants' objection as to the
9 loss is not well taken.

11:36:39 10 So now, Mr. Goldberg, I am going to address your
11 objections that are primarily in your sentencing memorandum
12 and certainly, when I conclude, if there are any other
13 objections that I have missed, I'm sure you will let me
14 know, but I'm taking your most recent ones in your
11:37:07 15 memorandum.

16 MR. GOLDBERG: Thank you, Your Honor.

17 THE COURT: Your next objection is in regards
18 to paragraph 49, the two-level increase for business of
19 receiving and selling stolen property.

11:37:37 20 So if you're following along with me, that's on
21 page 13 of the presentence report, and it starts at the top
22 of the page, the first full sentence.

23 Mr. Goldberg, do you wish to be further heard on this
24 issue?

11:37:58 25 MR. GOLDBERG: Your Honor, I would just ask

1 that the Court consider the fact that the Government has
2 argued for the massive amount of loss attributable to eBay
3 fraud, and then we heard the testimony of Special Agent
4 Macfarlane, who indicated that at most, based on his
11:38:22 5 calculations, the -- well, I'll back up.

6 That at most, the credit card numbers that were
7 contained in the credit card or Cc 10000 database could have
8 been sold for was anywhere between 9,000 and \$72,000.

9 So -- and that was the only evidence of funds that
11:38:52 10 were derived from this group from buying and selling stolen
11 credit cards or account information.

12 I think that that guideline enhancement does not say
13 if you just bought and sold. It's not addressing that.
14 It's if you're in the business of doing it.

11:39:12 15 And I do not believe that we can legitimately and
16 nonspeculatively say that the Bayrob Group was engaged in
17 the business of doing this. This was something that was an
18 aside when the group transitioned away from one thing they
19 were doing into another sphere.

11:39:34 20 So they weren't in the business of doing this, and I
21 don't think it's properly assessed here. It wasn't asked
22 for, I don't believe, in the original PSI. It was added
23 later. And I don't believe it applies here.

24 And I think it's a little bit akin to criminal
11:39:50 25 livelihood, the kind of inquiry the Court would have to make

1 in terms of this being the business of -- I see that in drug
2 cases. The defendant had no other means of income other
3 than the criminal livelihood.

4 In this case, the buying and selling of stolen
11:40:07 5 credentials was clearly not the business that these people
6 were in. And for that reason this two-point enhancement
7 under 2B1.1(b) (2) (A) (i) should not be counted, Your Honor.

8 THE COURT: I believe you mean --

9 MR. GOLDBERG: I cited the wrong --

11:40:33 10 THE COURT: 2B1.1(b) (4) .

11 MR. GOLDBERG: Correct, Your Honor.

12 THE COURT: All right. Mr. Brown.

13 MR. BROWN: Thank you, Your Honor.

14 Bogdan Nicolescu dropped out of college. He didn't
11:40:46 15 have another job. This -- he was selling things on
16 AlphaBay, not Etsy. This is not a hobby or a craft
17 interest.

18 He was using the money to buy servers and other
19 infrastructure devices that supported the Bayrob Group.

11:41:02 20 There is every indication that Nicolescu, Danet, and
21 Miclaus were in the business of buying and selling stolen
22 property.

23 The testimony specifically of Special Agent
24 Macfarlane -- and I was listening, because I found this
11:41:15 25 interesting, the Government found this interesting.

1 He said that those cards on the table, that 10000 Cc
2 table, were possessed. He didn't say harvested.

3 And he was asked specifically about harvested
4 from -- he said possessed. They had to come from somewhere.

11:41:32 5 And then in 2016 they start as -- and again, the
6 testimony, and because words matter -- the vendor on
7 AlphaBay was the Bayrob Group. They were vendors. They
8 were selling. They were -- they were possessing and
9 selling. They were in the business of selling stolen
11:41:47 10 property.

11 And this, you know, when you think of the RSP, you
12 think of chop shops and engine blocks and VIN numbers.

13 But this is stolen property. They were going into
14 people's computers, especially now with the web browser that
11:42:05 15 they were starting to install, and stealing property,
16 credentials, things of value, anything of value, which in a
17 cyber world, we have to assign credentials and credit card
18 information and not just tangible things you hold in your
19 hand.

11:42:19 20 It's property that they stole, and then by going onto
21 AlphaBay they were selling those.

22 And more disturbingly, they were also selling proxy
23 service and space on those infected computers.

24 So they weren't just selling the credentials. They
11:42:34 25 were selling the laptop. They were selling the hard drive.

1 They were selling the botnets to be used for who knows what
2 type of criminal activity.

3 And because it was AlphaBay, we know it was criminal
4 activity.

11:42:45 5 Thank you, Your Honor.

6 THE COURT: In determining whether a defendant
7 is in the business of receiving and selling stolen property,
8 I have to look at a non-exhaustive list of factors:
9 Regularity and sophistication of the defendant's activities,
11:43:01 10 the value and size of the inventory of stolen property
11 maintained by the defendant, the extent to which the
12 defendant's activities encouraged or facilitated other
13 crimes, and the defendant's past activities involving stolen
14 property.

11:43:15 15 Here, the defendant -- defendants, but for right now
16 we're speaking of defendant Nicolescu -- operated a
17 long-standing and highly sophisticated scheme.

18 And as a result of the scheme, the Bayrob Group
19 obtained vast amounts of credit card data, which it did, in
11:43:35 20 fact, sell.

21 The participants in this scheme, which has been
22 pointed out by the Government, were unemployed or
23 underemployed.

24 I do, in fact, find that the defendant was in the
11:43:48 25 business of receiving and selling stolen property and the

1 adjustment will be applied.

2 And this is so even if the defendant was not initially
3 in the business of buying and selling property.

4 By the end of this scheme, defendant had, in fact,
11:44:06 5 sold credit cards on AlphaBay. And frankly, Agent
6 Macfarlane's testimony bolsters this Court's position that
7 the adjustment is warranted.

8 So the objection is not well taken.

9 The next objection by defendant Nicolescu is the
11:44:28 10 two-level increase for the -- an offense involving
11 trafficking of unauthorized access devices.

12 Do you wish to be -- you are still maintaining this
13 objection and do you wish to be further heard if the answer
14 is yes?

11:44:44 15 MR. GOLDBERG: Yes, Your Honor. And I'll
16 clear up any confusion that I caused, because my original
17 sentencing memorandum, I don't believe, maintained that
18 objection.

19 It said it was objected to at one place and then I
11:44:59 20 listed the objections and that was not one of them.

21 And then I did go back in further review and I
22 specifically, in the memorandum I submitted yesterday to
23 supplement, submitted the language of the guideline relating
24 to the application of the 1029A [sic] identity theft.

11:45:25 25 MR. BROWN: 28.

1 MR. GOLDBERG: -28A, identity theft. When
2 that is applied, Your Honor, when there's a conviction and
3 there's going to be a sentence, under that provision,
4 Application Note 2 of that guideline provision indicates
11:45:42 5 that the enhancement under 2B1.1(11) [sic] should not be
6 applied. It's pretty clear on the face of the language.

7 So I do maintain that objection.

8 And I apologize for the -- not noting it in my
9 original memorandum.

11:46:04 10 MR. BROWN: Thank you, Your Honor.

11 The trafficking and use of authentication features
12 should be applied for a number of reasons.

13 First of all, addressing the 1028A, I think it's
14 2.2.1, those were five aggravated identities. There were
11:46:21 15 hundreds of other identities used to support the criminal
16 structure.

17 And the application note in the language of that -- or
18 of the guideline chapter says if the 1028A had
19 authentication features for the underlying crimes herein,
11:46:40 20 the indictment would be wire fraud or -- yeah, wire fraud or
21 computer fraud.

22 Those five are a small snapshot of the entire criminal
23 activity. They should be applied because, again, it
24 demonstrates the harm caused by the theft of authentication
11:47:01 25 features.

1 The use of stolen authentication features and
2 trafficking in those was not limited to the five aggravated
3 identity thefts.

4 And, in fact, those five aggravated identity thefts
11:47:10 5 came at a point in time when additional identities and
6 credentials were being used, which we cited in our brief
7 that it was both credentials and authentication features on
8 eBay and in various -- in other various uses to support the
9 structure and promote the structure of the crime.

11:47:30 10 So we think that the -- the enhancement can coexist
11 with the 1028A convictions, because they're separate and
12 they're of different natures.

13 The 1028As were definite certain people and
14 these -- the offensive behavior contemplated in this
11:47:50 15 enhancement includes all of the other stolen credentials,
16 whether they were active or not active, whether they were
17 proven "good" like on these databases or not, or whether
18 they were just sold to other users.

19 So we think that reading the guideline section for the
11:48:07 20 1028A is -- that narrowly is limiting both the intention or
21 how the 1028A was written.

22 It limits the use and the reason for that enhancement,
23 which is to encompass the larger criminal behavior, and it
24 also severely under-reflects and underreports what that
11:48:30 25 enhancement is reflecting in this case, which is hundreds

1 and hundreds of authentication features being harvested and
2 used to support the criminal infrastructure, not just those
3 five aggravated identity theft convictions.

4 You've got questions, Your Honor.

11:48:47 5 THE COURT: Well, Mr. Brown, I'm not certain I
6 quite follow your rationale.

7 MR. BROWN: If -- yes.

8 THE COURT: I agree that I can't apply the
9 specific offense characteristic for transfer, possession, or
11:49:08 10 use of a means of identification. That's what the section
11 says.

12 But our two-level increase here is for production or
13 trafficking --

14 MR. BROWN: Well --

11:49:22 15 THE COURT: -- of an unauthorized access
16 device. Am I not correct?

17 MR. BROWN: And authentication feature. And
18 they certainly traffic. And then that's why I'm saying that
19 you can't read as narrowly the 1028A.

11:49:35 20 THE COURT: Okay. Maybe we're saying the same
21 thing, just in a little bit different way.

22 MR. BROWN: And you're saying it better,
23 Your Honor.

24 THE COURT: No, I'm sure I'm not.

11:49:43 25 But, Mr. Goldberg, as far as I am concerned, I

1 acknowledge that I cannot give it for transfer, possession,
2 or use of a means of identification, but I can for
3 production or trafficking of an authorized access device.

4 Nothing in application note 2 that you refer to
11:50:01 5 prohibits an increase when the defendant is convicted for
6 the production or trafficking of an unauthorized access
7 device.

8 And again, as opposed to transfer, possession, or use
9 of a means of authentication. And because access device
11:50:22 10 includes credit card numbers and because the scheme involved
11 the sale of credit card numbers, I do, in fact, believe that
12 the two-level increase is appropriate and the objection is
13 overruled.

14 Your next objection is to the four-level increase
11:50:39 15 because of the conviction under 1030, and this is your *ex*
16 *post facto* argument.

17 MR. GOLDBERG: And the only thing I would add
18 to it, Your Honor, is I would refer the Court to guideline
19 section -- I believe it's 1B -- 1B1.11.

11:50:56 20 THE COURT: 1B.11?

21 MR. GOLDBERG: 1B1.11(b)(1) indicates that if
22 the Court determines the use of the guidelines manual in
23 effect on the date --

24 THE COURT: Okay.

11:51:12 25 MR. GOLDBERG: -- that the defendant is

1 sentenced would violate *ex post facto*, the Court shall use
2 the guideline manual in effect on the date that the offense
3 and conviction was committed.

4 The argument I made in brief, I'll stand on that, and
11:51:27 5 here's authority for it in the guideline itself. And I
6 believe that the guideline manual from 2015 would come out
7 to the same level with the exception of this extra four
8 points under paragraph 49 of the PSI.

9 MR. BROWN: Your Honor, I'm a little confused
11:51:46 10 as to what the problem is. I admit, I had computer problems
11 last night. I couldn't log on to anything so I had to go
12 back to my books.

13 And going to the guideline manual in 2016 -- I also
14 pulled 2009, 2008 -- there is a four-level enhancement under
11:52:06 15 2B1.1. -- or 1B.11.

16 Here, let me pull out 2008, which is when our
17 investigation began.

18 I'm sorry. For 10.

19 Wait. Where is that?

11:52:23 20 MR. GOLDBERG: B19.

21 MR. BROWN: Sorry. Yeah. 14B. They still
22 have that -- here it is.

23 In 2008, it was under B1.1(15)(a)(2). Plus four for
24 conviction under 18 U.S.C. 1030(a)(5)(A), sub(1).

11:52:44 25 So Your Honor, there is no *ex post facto*. It might

1 have been changed paragraph numbers, but since 2008 through
2 the present, there's always been a four-level enhancement
3 consistent with the 2019 enhancement of four levels.

4 THE COURT: Ms. Morgan.

11:53:03 5 PRETRIAL PROBATION OFFICER: Your Honor, I
6 would just argue --

7 THE COURT: Mr. Brown is saying you don't even
8 have to get into the -- we'll call it the *ex post facto*
9 argument -- because it's the same in both manuals; am I
11:53:16 10 correct?

11 MR. BROWN: Maybe a different paragraph
12 number, but that --

13 PRETRIAL PROBATION OFFICER: That would be
14 correct, Your Honor.

11:53:23 15 THE COURT: That was not the response, but you
16 have since looked at it.

17 PRETRIAL PROBATION OFFICER: I would agree
18 with the Government, Your Honor. My initial response was to
19 the one book rule used at the time of sentencing, you only
11:53:37 20 use one book to determine the guideline range.

21 And that there is authority for that one in the
22 sentencing guidelines.

23 But I would agree we don't need to get to that
24 argument when the adjustment has been there the entire time.

11:53:51 25 THE COURT: Mr. Goldberg, I'll give you a

1 moment to look at it.

2 MR. GOLDBERG: Your Honor, I would concede
3 that if the language is exactly the same and it's the
4 paragraph number is the only change, then I'm wrong.

11:54:04 5 THE COURT: All right.

6 Just for the heck of it, I am going to say that even
7 if the language hadn't been the same, I don't see *ex post*
8 *facto* applicability here because 1B1.11(b)(3) makes it clear
9 if a defendant is convicted of two offenses, one committed
11:54:32 10 before and one after, a revised edition of the guideline
11 manual becomes effective, the revised edition is to be
12 applied to both offenses.

13 And in our case, because the defendant's criminal
14 conduct continued after 2015, *ex post facto* clause is simply
11:54:54 15 not violated by using the 2015 edition of the manual.

16 And because, Mr. Brown, I state that because I assumed
17 that both parties were in agreement that the language had
18 changed.

19 So in an abundance of caution, I am going to overrule
11:55:17 20 the objection based upon your statement that the language is
21 the same. But even if for some reason you're misreading it,
22 I do find the *ex post facto* clause is not violated.

23 All right. So we are now at a base offense level of
24 37 instead of 39, and that is because where the probation
11:56:00 25 officer added 20 levels, this Court has added 18 levels to

1 the amount of loss, which takes us from the stated 39 in
2 paragraph 49 to a 37.

3 The next objection is the next paragraph, and that's
4 paragraph 50.

11:56:31 5 The defendant was convicted under 18 U.S.C. 1956,
6 which is why there is an increase of two levels.

7 Mr. Goldberg, you're maintaining the objection,
8 correct?

9 MR. GOLDBERG: I am maintaining the objection,
11:56:45 10 but I'm offering no further argument.

11 THE COURT: All right. Mr. Brown.

12 MR. BROWN: Your Honor, the Government's
13 position is it's pretty straightforward.

14 They were -- sorry.

11:56:54 15 They were convicted of the 1956 conviction, 2S1.1 or
16 so, whatever that is, directs you to -- yeah, 2S1.1(b)(2)(B)
17 directs you to add two and since it was a 1956(h), it's a
18 1956 conviction.

19 THE COURT: I agree. The jury convicted the
11:57:15 20 defendant of conspiracy to commit money laundering in
21 violation of 18 U.S.C. 1956(h). The object of the
22 conspiracy was not solely to violate 1957, but rather 1956.

23 Therefore, the defendant's argument is rejected and
24 the two-level adjustment is proper.

11:57:39 25 I believe we all agree -- so the plus two in

1 paragraph 50 remains.

2 Paragraph 51, we all agree should change from a plus
3 two to a zero.

4 Mr. Brown.

11:57:53 5 MR. BROWN: That is correct, Your Honor.

6 THE COURT: All right.

7 The next objection relates to paragraph 53, and that
8 is aggravating role.

9 Mr. Goldberg, you're maintaining your objection; am I
11:58:11 10 correct?

11 MR. GOLDBERG: I am maintaining my objection
12 that Mr. Nicolescu does not merit the four-point enhancement
13 but should be considered for the three or two-point
14 enhancement.

11:58:21 15 If you look at his overall conduct, especially with
16 regard to the money laundering count, which is the count of
17 conviction, he was not the leader, organizer.

18 I also would submit that he did not supervise more
19 than five or more people during the course of this -- these
11:58:40 20 criminal activities and that his role in this matter was
21 almost exactly the same as Mr. Danet, who testified in Court
22 on behalf of the Government.

23 With that, I'll defer to my memo.

24 MR. BROWN: Thank you, Your Honor.

11:58:55 25 He's the master of frauds. MasterFraud. He -- to

1 look at it just as money laundering as the aggravating role
2 is to put the horse -- or the cart about 10 Romanian blocks
3 in front of the horse.

4 Without my eBay, which is what he called the
11:59:17 5 fraud -- or the virus -- without the virus, the Trojan,
6 there would be no money laundering in this conspiracy,
7 right? So he created the opportunity for money laundering,
8 and then he created the virus that infected everybody.

9 He oversaw more than five people. He moved -- when
11:59:39 10 Danet left, he moved more people in. He recruited
11 Valentine Danet. He recruited people to come into the
12 conspiracy.

13 To get into the command and control server, you had to
14 take multiple sophisticated complicated steps to thwart
11:59:58 15 security and to create greater protections of your
16 anonymity.

17 Who set up the wireless routers, the -- if you
18 remember the exhibit, the orange antenna, who set that up,
19 who installed all of the software onto people's computers?
12:00:13 20 It was Nicolescu.

21 He designed the software, he designed the security, he
22 designed the protection for everything.

23 To say that he was not the leader is to ignore all of
24 the evidence that the jury accepted, all of the evidence
12:00:28 25 that the jury agreed showed that he was, in fact, deserving

1 of the moniker he gave himself, which was MasterFraud.

2 THE COURT: Mr. Brown, do you agree that this
3 adjustment is for leadership role in the money laundering
4 conspiracy?

12:00:51 5 MR. BROWN: Your Honor --

6 THE COURT: Technically.

7 MR. BROWN: But I don't think you can -- I
8 don't think you can separate the money laundering conspiracy
9 from the rest of the organization.

12:01:00 10 THE COURT: I understand that, but you do
11 acknowledge that this adjustment is for the money laundering
12 conspiracy technically?

13 MR. BROWN: Yes.

14 THE COURT: Okay.

12:01:11 15 MR. BROWN: But the money laundering is also
16 to promote the criminal activity, and that was one of the
17 theories of the age conspiracy. And the promotion was
18 controlled, maintained, and more specifically, evolved by
19 and at the direction of Nicolescu.

12:01:27 20 The move to cryptocurrencies, the move to AlphaBay,
21 the move to, you know, or away from the eBay. This was all
22 driven by Nicolescu.

23 THE COURT: I agree with you.

24 MR. BROWN: Thank you.

12:01:40 25 THE COURT: Witnesses testified that this

1 defendant was the mastermind behind the entire operation,
2 and the entire operation includes the money laundering
3 scheme.

4 Nicolescu controlled the money mule network in the
12:01:54 5 United States which was necessary to the success of the
6 money laundering scheme. He provided directives to other
7 members in the conspiracy.

8 And although other minor members of the conspiracy
9 came and went, certainly this defendant, as well as another,
12:02:11 10 were -- was a constant member of the scheme. He maintained
11 control of the money laundering scheme by limiting and
12 controlling the interactions between other members.

13 Thus, I do, in fact, find that he was an organizer or
14 leader of the money laundering scheme and the four-level
12:02:33 15 adjustment is appropriate. The defendant's objection is not
16 well taken.

17 Paragraph 55 now becomes a 43. Again, two levels came
18 off of paragraph 49, and two levels came off of
19 paragraph 51.

12:03:03 20 So the adjusted offense level is a 43.

21 Since there were no Chapter 4 enhancements, no
22 acceptance of responsibility, the total offense level is a
23 43.

24 Mr. Goldberg, are there any objections I missed?

12:03:26 25 MR. GOLDBERG: I don't believe so, Your Honor.

1 Thank you.

2 THE COURT: All right. And on behalf of the
3 Government.

4 MR. BROWN: No objections, Your Honor, thank
12:03:33 5 you.

6 THE COURT: I do, in fact, find total offense
7 level is a 43, and that is as to Count Group 1.

8 The Court is well aware of Count 16 through 20, that
9 the guideline sentence is the term of imprisonment required
12:03:52 10 by statute. And a 43 and a criminal history category of 1,
11 and the defendant doesn't have any criminal history points,
12 results in a guideline imprisonment range of life.

13 Because the statute does not provide for life, it is
14 incumbent upon this Court to then reduce it to a 42, which
12:04:24 15 is 360 months to life.

16 Ms. Morgan, did I state that accurately, ma'am?

17 PRETRIAL PROBATION OFFICER: I believe so,
18 Your Honor.

19 THE COURT: Mr. Brown?

12:04:36 20 MR. BROWN: I believe so, yes, Your Honor.

21 THE COURT: Mr. Goldberg?

22 MR. GOLDBERG: I think the Court has to take
23 into consideration the aggregate statutory maximums.

24 THE COURT: Which is less than life.

12:04:48 25 MR. GOLDBERG: Which is 20. Which is a total

1 of 20.

2 MR. BROWN: For wire fraud? Right?

3 MR. GOLDBERG: Correct.

4 MR. BROWN: I'm just checking to make sure.

12:05:10 5 THE COURT: Conspiracy to commit mail and wire
6 fraud is imprisonment of not more than 20 years.

7 MR. GOLDBERG: So our --

8 MR. BROWN: Right. It would only be 30 if it
9 affected a financial institution.

12:05:23 10 MR. GOLDBERG: Yes. So our position on this
11 is that the statutory maximum, the aggregated offenses, not
12 including the 1028 counts, is 20 years.

13 And the guideline should reflect of maximum of 240
14 months, not 360. That was an objection we maintained, I
12:05:39 15 believe, with the PSI.

16 MR. BROWN: That is correct. So the
17 guideline -- and I believe it would be -- right.

18 So it would have to be reduced to the highest
19 guideline that includes the stat max, I believe, which would
12:06:00 20 be a 38, which is 235 to 293.

21 So the guideline range would be 235 to 240 if I --
22 going back to my narcotics here.

23 THE COURT: So, Ms. Morgan, you were
24 accounting for consecutive time?

12:06:21 25 PRETRIAL PROBATION OFFICER: Correct,

1 Your Honor.

2 THE COURT: And, Mr. Brown, you are agreeing
3 with Mr. Goldberg?

4 MR. BROWN: Just on the guideline calculation,
12:06:27 5 setting aside Counts 16 through 20.

6 THE COURT: We're not talking about 16 through
7 20. Correct me if I'm wrong.

8 What Ms. Morgan did was take each one of the counts,
9 took the statutory maximum, and ran them consecutive.

12:06:48 10 MR. BROWN: Okay. I understand.

11 THE COURT: And it is your position, as is
12 Mr. Goldberg's, that you don't -- in order to find that
13 first guideline level, you don't go consecutive.

14 MR. BROWN: I was under the impression that
12:07:03 15 because the offense conduct was part of a continuing course
16 of conduct, there was merger under the 2S1.1 and the wire
17 fraud.

18 THE COURT: Because I have agreement of
19 counsel, I will, in fact, drop it then from a 43 to a 38.

12:07:24 20 MR. BROWN: Okay.

21 THE COURT: Gentlemen, let me ask you, do you
22 prefer that we finish with Mr. Nicolescu or go to the
23 objections of Mr. Miclaus?

24 Do you have a preference, Mr. Goldberg?

12:07:47 25 MR. GOLDBERG: I really don't, Your Honor. I

1 think that Mr. O'Shea is ready to go on the role issue.

2 THE COURT: Mr. O'Shea.

3 MR. O'SHEA: Let me think about that for a
4 second.

12:08:00 5 THE COURT: Well, you know, Mr. O'Shea,
6 because I think many of your arguments are the same, it
7 might be helpful if we did proceed right to your objections.

8 As long as Mr. Goldberg doesn't have any major
9 objection, he has to sit here longer.

12:08:16 10 MR. GOLDBERG: I have no major objections to
11 anything Mr. O'Shea wants to do.

12 THE COURT: All right.

13 MR. O'SHEA: All right. Thank you, Your
14 Honor. -- yes, ma'am.

12:08:26 15 THE COURT: Well, go ahead. Let me see what
16 you're going to say.

17 MR. O'SHEA: I thought we had determined that
18 I would just argue role at this point because you dispensed
19 with all the other ones.

12:08:37 20 THE COURT: Okay. If you would just give me
21 one moment.

22 MR. O'SHEA: Yes, ma'am.

23 THE COURT: Mr. O'Shea, I found that your
24 objections in your sentencing memoranda really repeated the
12:09:09 25 objections in the presentence report.

1 So let's quickly go over them to make certain that I
2 get all of your objections, and you can tell me if you're
3 maintaining it or not.

4 MR. O'SHEA: Very well, Judge.

12:09:22 5 THE COURT: Objection to paragraph 4, it
6 really doesn't go to guideline calculation. Are you
7 maintaining it?

8 MR. O'SHEA: Let me catch up to you, Judge.

9 THE COURT: Sure. I'm on page 26.

12:09:38 10 Oh, I'm sorry. Before I begin, Ms. Morgan, you did
11 communicate with the Court sometime ago and indicate that
12 there was an error on page 32, and that you wanted to
13 correct it orally, here in court.

14 Correct me if I'm wrong.

12:10:01 15 Mr. O'Shea, it's page 32 -- I'm sorry -- and
16 Mr. Brown, Mr. McDonough. Page 32.

17 It's -- you see the paragraph that starts "The
18 probation officer agrees," if you go up from that three
19 sentences, the sentence starts, "Further, the defendant was
12:10:32 20 not a mope in the money laundering scheme. He was in charge
21 of the" -- and it has there, U.S. portion.

22 Ms. Morgan, you indicated that that was a typo, and
23 you meant it to read European?

24 PRETRIAL PROBATION OFFICER: That's correct,
12:10:49 25 Your Honor.

1 THE COURT: Mr. Brown, Mr. McDonough, do you
2 see where I'm at?

3 MR. BROWN: Yes. And we would agree with the
4 oral correction, that he was both not a mope and in charge
12:11:00 5 of European operations.

6 THE COURT: Well, okay. I'm not getting
7 there. I'm not there yet.

8 Mr. O'Shea, do you see the correction?

9 MR. O'SHEA: I note the correction,
12:11:08 10 Your Honor.

11 THE COURT: Okay. So now, let's go back to
12 page 26. Your objection to paragraph 4. Are you
13 maintaining it?

14 MR. O'SHEA: One moment, please, Judge. I'm
12:11:19 15 looking at my sentencing memorandum.

16 Maintaining that objection, Judge.

17 THE COURT: All right. The objection is
18 overruled.

19 The report basically recites what is in the
12:11:42 20 indictment, and I believe the probation officer was in her
21 right to do so, and I note, again, that this does not go to
22 the guideline calculations.

23 The next objection is paragraph 8.

24 Are you maintaining it?

12:12:00 25 MR. O'SHEA: I am, Your Honor.

1 THE COURT: Again, this does not go to
2 guideline calculation. It's overruled.

3 Paragraph 13, does, in fact, state that the defendant
4 was acquitted of the enhancement. So I see nothing wrong
12:12:12 5 with the report.

6 Paragraph 15, are you maintaining that?

7 MR. O'SHEA: We'd already done this this
8 morning, so, yeah. We maintain the objection for the
9 record, Your Honor.

12:12:30 10 THE COURT: Okay. Defendant is objecting that
11 the presentence report relies on the theories of loss
12 provided by the Government and does not provide an
13 independent accounting.

14 I'm overruling that objection. The probation officer
12:12:47 15 notes in her response that she simply provided a summary of
16 information. She did receive the information from the
17 Government. She never received any information from the
18 defendant regarding loss amounts, except to note that the
19 loss amounts would be contested.

12:13:06 20 And, again, I have thoroughly addressed the loss
21 amount, so that objection is not well taken.

22 Are you maintaining your objection to paragraphs 16
23 and 17?

24 MR. O'SHEA: Yes, Your Honor.

12:13:20 25 THE COURT: Again, this does not go to the

1 guideline calculation, but if the Government would like to
2 discuss this issue, I simply don't have enough information
3 to know if that should be included in the report or not
4 included in the report.

12:13:40 5 MR. BROWN: And, Your Honor, I think this is
6 relevant to what's been called the mope factor. The
7 defendant was actively engaged in hundreds and hundreds of
8 eBay postings. He was -- to use such a broad term as not --
9 not --

12:14:01 10 THE COURT: Well, Mr. Brown --

11 MR. BROWN: -- involved with 500 victims. He
12 was involved with in excess of 500 victims through the eBay
13 fraud alone.

14 He was involved -- however you want to describe it --
12:14:12 15 with over 60,000 computers.

16 THE COURT: And I guess that's -- the 60,000
17 computers is, I'm just -- I don't know.

18 MR. BROWN: Well, the --

19 THE COURT: Where did we get that from?

12:14:21 20 MR. BROWN: Well, the size of the botnet grew
21 consistently throughout the course of the conspiracy. And
22 the benefit and the fruits of having such a large computer
23 network, if for no other reason than for cryptomining,
24 was -- without putting Special Agent Macfarlane back up, but
12:14:42 25 I can proffer -- it was consistently, towards the end, well

1 over 600,000 [sic], if not well over 100,000 computers
2 within the botnet, as high as 400- or perhaps even 600,000
3 computers.

4 THE COURT: Again, this doesn't even go to a
12:14:59 5 guideline calculation, so I'm going to overrule the
6 objection for what it's worth.

7 Objection to 18, 19, 20, and 21. Are you even
8 maintaining that, given --

9 MR. O'SHEA: I have to, Your Honor, yes.

12:15:32 10 But for the record, I do, but, you know, I get what
11 I'm hearing from what the Government said this morning is
12 that, you know, he assisted in some stuff. But the computer
13 skills factor just wasn't presented at trial.

14 THE COURT: Okay. I get --

12:15:45 15 MR. BROWN: Your Honor, he actually -- it was
16 presented at trial. He advertised his computer skills on
17 that freelancer.com, and he had a whole paragraph of skills
18 that he was offering for sale that were directly related to
19 what the eBay group -- or the Bayrob Group was doing, as
12:16:03 20 well as all sorts of other stuff. So --

21 THE COURT: I completely agree with you.
22 Frankly, I find that the evidence was overwhelming in that
23 regard. So the objection is overruled.

24 Objections to paragraphs 25 to 42. This is objecting
12:16:16 25 to the four-scheme structure set forth in the indictment and

1 the "duplicative stacking of multiple counts in the
2 indictment."

3 I'm going to overrule it. There's nothing improper
4 about the indictment.

12:16:32 5 Paragraph 43, defendant notes he was acquitted of the
6 false domain registration enhancement. It's overruled. He
7 absolutely was. The probation officer notes it, but the
8 probation officer also has a duty to note that he was
9 charged with it and then found not guilty.

12:16:51 10 Paragraph 44, are you even maintaining that regarding
11 victim impact statements?

12 And I think this is the appropriate time, Mr. O'Shea,
13 to say, I don't think anybody is asking for restitution
14 here.

12:17:07 15 MR. BROWN: No, Your Honor.

16 THE COURT: So I don't --

17 MR. O'SHEA: In light of that, it's become
18 moot, Your Honor.

12:17:19 19 THE COURT: All right. Paragraphs 46 and 47
20 go to acceptance of responsibility.

21 Are you maintaining that objection?

22 MR. O'SHEA: I am, but I don't know if we do
23 it right now, Your Honor. Might do it on the variance and
24 departure stuff, but . . .

12:17:31 25 THE COURT: It's up to you.

1 MR. O'SHEA: We maintain the objection for
2 purposes of what we're doing now.

3 THE COURT: Okay. So meaning the probation
4 officer was incorrect in assigning zero. That's the stage
12:17:43 5 we're at right now.

6 MR. O'SHEA: Yes.

7 MR. BROWN: Your Honor, there are no grounds
8 at all that the Government would offer any departure for
9 acceptance of responsibility. He went to trial.

12:17:56 10 The Government is at a loss how to respond to the
11 rejection multiple times of offers as relevant to sentencing
12 today.

13 The jury heard and convicted on all of the evidence.

14 The Court heard and is going to be sentencing on all
12:18:13 15 of the evidence.

16 THE COURT: I will say, there are rare
17 circumstances where a defendant can receive acceptance of
18 responsibility even though he chooses to proceed to trial.

19 I do not find that the defendant's proffer -- and
12:18:29 20 that's really what the argument here is -- is because of the
21 proffer, he should get acceptance. I don't find that the
22 proffer is one of those rare situations. He is not entitled
23 to acceptance of responsibility.

24 Objection to paragraph 47. And this is, again, the
12:18:50 25 1030 conviction, and we now hear that the language is the

1 same. So I'm going to overrule the objection.

2 And even if for some reason Mr. Duncan has stated it
3 inaccurately, I do not find the *ex post facto* clause to have
4 been violated.

12:19:06 5 Paragraph 49, this goes to loss. The argument is, is
6 the Government has functionally forever locked itself into
7 the loss amount from the initial presentence report. And I
8 do not agree that they have locked themselves in at all.

9 Paragraph 49, I don't believe is -- no, I apologize.
12:19:43 10 49 you are specifically objecting to sophisticated
11 means.

12 Am I correct that you agreed prior to today that you
13 are not maintaining that objection?

14 MR. O'SHEA: Yeah. Based on the agreement we
12:19:58 15 made with the Government, yes, Your Honor.

16 THE COURT: All right.

17 Paragraph 50, this is the two-level adjustment under
18 2S1.1.

19 Are you maintaining that objection?

12:20:20 20 MR. O'SHEA: Just for the record, Your Honor,
21 I think you've already addresses it.

22 THE COURT: I have.

23 It's overruled for the same reasons I stated in
24 regards to Mr. Nicolescu.

12:20:30 25 Paragraph 51. This is sophisticated laundering, but

1 the -- we have already afforded that zero point, so that is
2 no longer relevant.

3 MR. O'SHEA: Agreed.

4 THE COURT: All right. Paragraph 53, you
12:20:52 5 objected. However, the probation officer agreed and amended
6 the report, so that is no longer relevant.

7 MR. O'SHEA: Right.

8 And, Judge, part of my sentencing memorandum is off, I
9 think, by some paragraph references. I think -- because the
12:21:11 10 amended PSI came out with different paragraph numbers
11 than --

12 THE COURT: Oh, okay.

13 MR. O'SHEA: So I just want to make sure that
14 I got it right. You make reference to paragraph 53.

12:21:24 15 THE COURT: You're right.

16 MR. O'SHEA: That really should be
17 paragraph -- let me see here.

18 THE COURT: 51. You're right.

19 MR. O'SHEA: Okay.

12:21:31 20 THE COURT: And that's not relevant anymore
21 because the Government has agreed.

22 MR. O'SHEA: Understood, Judge.

23 THE COURT: All right. So now we are at
24 the -- I believe, and correct me if I'm wrong, the only
12:21:43 25 objection remaining, which is role in the offense.

1 So let me first establish that. Is that the only
2 remaining objection?

3 MR. O'SHEA: Yeah, Judge. Just for the
4 record, in my sentencing memorandum I refer to it as
12:22:00 5 paragraph 54. It should be paragraph 53.

6 THE COURT: Right. Is that the only other
7 objection?

8 MR. O'SHEA: Yes.

9 THE COURT: You now may be heard.

12:22:08 10 MR. O'SHEA: Thank you, Your Honor.

11 I know, I expect that the Government will disagree
12 with me here, but I can't imagine how they could make
13 Mr. Miclaus into a manager of this operation, given the
14 evidence that I heard at trial.

12:22:22 15 I think he was utilized, and I call him a mope because
16 that's what I think my history of the criminal justice
17 system portrays him to be, that he was just used just sort
18 of like a bagman to assist the operation.

19 Assuming that we agree with everything the jury found
12:22:43 20 here in the Government's theory, it is impossible for me to,
21 even marginally, equalize his conduct in this operation, in
22 this Bayrob Group, with that of the gentleman to my left,
23 Mr. Nicolescu. It's impossible for me to do that.

24 And it's -- I think it strains a fair amount of
12:23:04 25 credibility for the Government to argue that he had some

1 sort of equal managerial role here.

2 You know, to use a McDonald's -- I mean, type of
3 analogy, he's the -- my client is the fry boy, and the guy
4 to my left here, Mr. Nicolescu, is the manager of this
12:23:21 5 restaurant.

6 And for the Government to argue that he had some sort
7 of manager or supervisory role defies the evidence that I
8 heard at trial.

9 And I just -- I can't -- I can't even understand how
12:23:36 10 the Government would argue that just because he was a bagman
11 and assisted at maybe transporting money, and because he put
12 up a single ad that he had computer skills, which the
13 Government never produced any evidence at trial that he
14 wrote any code.

12:23:57 15 I think we addressed this a little bit this
16 morning -- that he designed the operation, that he had
17 anything to do with the actual computer botnet itself, that
18 he was managing that, coming up with a scheme or anything
19 like that on his own defies the evidence that was produced
12:24:14 20 at trial. Even at sentencing today, I think the Government
21 was tacitly conceding that.

22 So and, you know, for whatever value it has, you know,
23 going back to trial again, we have to look, you know -- and
24 I point this out, I think in the sentencing memorandum --
12:24:37 25 you have to do a compare and contrast analysis of the

1 operators in this group.

2 And when we look at guys like Mr. Danet and these
3 Romanian witnesses that came in -- do you remember those
4 guys, the ones that weren't even charged with a crime -- and
12:24:52 5 then you look at my client and you compare them, it's just
6 not fair to say he had some sort of supervisory or
7 managerial role.

8 When compared -- and we point this out in our
9 sentencing memorandum. You can compare even unindicted,
12:25:09 10 uncharged people in determining that type of role. You're
11 allowed to do that. That's legal to do.

12 So merely because he's one of the two at the table
13 does not automatically make him into a manager or
14 supervisor.

12:25:24 15 We have to look at the other people that cut a deal,
16 including Mr. Danet. We have to look at the other operators
17 that came in here that were flown over here by the
18 Government at the 11th hour to testify in the trial in
19 analyzing whether my client really ranked anywhere near
12:25:43 20 above what I call a fry boy role, Your Honor.

21 MR. BROWN: Your Honor, yeah. I think it
22 strains the evidence, and, frankly, insults the jury to call
23 Mr. Miclaus just a fry boy or a mope.

24 Mr. Miclaus was one of two members of the Bayrob Group
12:26:09 25 who was present at the inception of the Bayrob Group and was

1 present at the time of the arrest of the Bayrob Group.
2 Danet came and went. Miclaus stayed. He was always there,
3 he was always a member.

4 To say that posting hundreds, if not thousands of
12:26:28 5 auctions on eBay is relegated to fry boy is to insult the
6 victims who were victimized by those ads and those auctions,
7 and it also misrepresents the enthusiasm and the consistency
8 that he acted in.

9 He posted auctions. He met with Antonovich and other
12:26:49 10 mules. I mean, you heard from Antonovich that they would
11 pull up -- it was like out of a movie -- that they would
12 pull up, roll down windows or open doors and pass bags of
13 cash to each other.

14 It wasn't -- Antonovich was passing it to the
12:27:03 15 controlling member of the money laundering part of the
16 Bayrob Group.

17 There -- he and Nicolescu were the only two people who
18 got money from Antonovich, and I believe the testimony was
19 Nicolescu did it once.

12:27:17 20 Every other transaction with cash was done by Miclaus.
21 He was the head of the money laundering operation and he was
22 the one who carried the money home, literally and
23 figuratively.

24 THE COURT: Miclaus was the head of the money
12:27:30 25 laundering.

1 MR. BROWN: Well, he was the one who took the
2 money. He was the one who received the money from
3 Nicolescu, who -- or from Antonovich, who aggregated it from
4 the money mules picking it up at Western Union.

12:27:43 5 He was the guy -- he was the one who within the Bayrob
6 Group was touching the money last. That's what the
7 Government's position, that testimony from Antonovich would
8 lead one to believe about Miclaus's role.

9 He also was, when they switched over to eBay, he was
12:27:58 10 the one posting on his Twitter account about Y pool and was
11 making the shift to cryptocurrency mining back in 2013,
12 2014, when the Government would argue most of the world
13 still didn't know, let alone understand, what cryptomining
14 was. He was there.

12:28:15 15 He had the skills to do as much as he was doing, if
16 not more. The fact that he didn't do more, I think, nobody
17 can safely say.

18 He -- but what we do know is he was there all the
19 time. He was actively involved and he was actively evolving
12:28:34 20 along with the eBay group -- or the Bayrob Group.

21 The Government also will say, you know, this role and
22 this, you know, the argument about proffering -- and it's
23 something we'll hear again I'm sure later in the
24 afternoon -- can't be used as a shield and a sword.

12:28:53 25 You can't say, well, my guy proffered and he should be

1 given a lot of credit for that because he came in and
2 proffered and told all about everything he knew, and then
3 say, well, wait a second, he's working the shake machine on
4 the drive-through. He doesn't -- you know, he can barely
12:29:08 5 put on his paper hat at the McDonald's.

6 If that's the case, then yeah, the proffer is worth
7 zero, the proffer is worth no consideration. If you want to
8 say the proffer is worth a lot, then you do have to concede
9 that the proffer is worth a lot because he was a higher up.

12:29:21 10 Again, Your Honor, the Government would concede that
11 the proffer is not worth anything, but he is a higher up.
12 The proffer is not worth anything because he rejected it.
13 He determined the value of the proffer by rejecting it.

14 However, his role is very much appropriate and
12:29:36 15 deserving of an aggravated role. This was a 400- to 600,000
16 computer botnet. It operated over ten years. It stole
17 millions and millions of dollars.

18 You don't -- in an operation like that -- and it was
19 an operation where they bragged that there were five people
12:29:54 20 involved in this. He was one of the five.

21 Investigation showed there were really three core
22 members. He was one of the three.

23 You don't ride for free in an operation like that. He
24 had skills. He applied his skills, and he received great
12:30:08 25 benefit.

1 He was an underemployed skydiving teacher in
2 Bucharest, Romania, but he had BMWs, he had the ability to
3 travel the world, he had the ability to skydive, and he
4 definitely reaped the benefits of a person deserving all
12:30:25 5 four levels of aggravating role.

6 Thank you.

7 THE COURT: I agree with the Government.

8 Let me begin by saying there can be more than one
9 leader or organizer of a criminal conspiracy.

12:30:38 10 I am instructed to look at certain factors such as
11 exercise of decision-making authority, nature of
12 participation in the commission of the offense, the
13 recruitment of accomplices, the claimed right to a larger
14 share of the fruits of the illegal activity, the degree of
12:30:57 15 participation and planning or organizing the offense, the
16 nature and scope of the illegal activity, and the degree of
17 control and authority exercised over others.

18 When I look at all of the evidence that was presented
19 at trial, I do, in fact, agree that Mr. Miclaus was, in
12:31:18 20 fact, a leader or organizer, not the sole, but a leader or
21 organizer. The objection is not well taken.

22 MR. O'SHEA: Judge, one last thing. I'm
23 sorry.

24 THE COURT: Sure.

12:31:31 25 MR. O'SHEA: I see in the report not plus 4

1 but plus 3. Did we address that, Judge? Because the PSI
2 said plus 3 and I just heard the Government say plus 4.

3 THE COURT: I have 4 here. Paragraph 53? I'm
4 on the report that was revised September 16th, 2019.

12:32:18 5 MR. O'SHEA: On paragraph 53 mine says plus 3,
6 Judge.

7 THE COURT: Mine says plus 4.

8 Ms. Morgan, Document Number 188?

9 Do I have an agreement, Mr. Brown?

12:32:36 10 MR. BROWN: I would say plus 4. Our document
11 is 184. But we argued plus 4 in our brief.

12 THE COURT: I'm going off the latest, which is
13 188.

14 MR. O'SHEA: I have 184, Judge. That's what I
12:32:49 15 was referring to. I apologize.

16 THE COURT: Well, that's not the latest one.
17 The latest one is date report revised September 16th, 2019,
18 and then there's in bold, "Second Revised Final,
19 October 15th, 2019," Document 188.

12:33:08 20 PRETRIAL PROBATION OFFICER: That's correct,
21 Your Honor.

22 THE COURT: So, Ms. Morgan, did you afford
23 three or four levels?

24 PRETRIAL PROBATION OFFICER: Four levels.

12:33:15 25 THE COURT: Yeah. That's what the latest

1 report has.

2 MR. O'SHEA: Can I ask just a fundamental
3 question. How did it go from 3 to 4?

4 THE COURT: I only look at the last report.

12:33:25 5 PRETRIAL PROBATION OFFICER: It was a typo on
6 my part. It was intended as four levels, and I believe that
7 in the -- I would have to check, but I thought that in
8 my -- it does say four initially and then over by the side
9 it says three. But it does reference four initially.

12:33:45 10 MR. O'SHEA: Sorry for the confusion.

11 THE COURT: That's all right. That's all
12 right.

13 So we are at a total offense Level 43, but we are all
14 in agreement because of the statutory maximum, we start at a
12:33:58 15 total offense level of 38, which is 235 to 293.

16 So Mr. Goldberg, let me start with you.

17 On the issue of sentencing, do you want me to turn to
18 you or to your client first?

19 MR. GOLDBERG: I think I'll go first,
12:34:26 20 Your Honor.

21 THE COURT: You go right ahead.

22 MR. GOLDBERG: Thank you, Your Honor.

23 May it please the Court.

24 As the Court knows, I was a latecomer to the case, and
12:34:33 25 before I start, I would compliment the Government -- without

1 prejudice to my client's postconviction relief if he seeks
2 that, or appeal -- I would say that the Government acted in
3 a highly professional way with me, providing me the
4 information after hours when needed.

12:34:49 5 And I commend the U.S. Attorney's Office for the
6 Northern District of Ohio on the gentlemen who are seated at
7 counsel table today, and the FBI on -- the agent.

8 That being said, I do think that this case stemmed a
9 little bit, and the treatment of my client stemmed a little
12:35:08 10 bit from what -- I'll use an O'Shea-ism and say a "white
11 whale syndrome," which was how the Department of Justice
12 can -- looked at the Bayrob Group, looked at Mr. Nicolescu,
13 and made this effort to track him down and to bring him to
14 justice here.

12:35:29 15 And once he was here, there was no compromise, there
16 was no serious plea negotiations. A proffer letter that
17 I -- I did not receive this proffer letter, but -- as part
18 of my representation, but it was provided to former counsel.

19 And that proffer letter is like nothing I've ever seen
12:35:47 20 before. It says that you can make a statement but if we
21 find something on your computers, we're using it against
22 you.

23 In other words, it's not really an opportunity to
24 proffer because anything that you give over in terms of
12:35:58 25 allowing the Government into your devices, they're going to

1 use against you.

2 Who would accept that?

3 And nonetheless, up until the Romanian witnesses, the
4 latecomers were rounded up by the Government and interviewed
12:36:18 5 and changed all their statements from we know nothing to we
6 know everything, at that point the Government pulled all
7 plea negotiations when my client was discussing pleading to
8 exactly what he was convicted of, the offenses minus the
9 specs. We would have been having the same conversation
12:36:40 10 right now about --

11 THE COURT: When you say "specs," you mean the
12 enhancement?

13 MR. GOLDBERG: The enhancement. The
14 specifications. That's a state term.

12:36:48 15 The enhancements that raised the offense -- the
16 statutory max to 37 -- I'm sorry -- to 27 years from 20 if
17 convicted of use of domain names.

18 We were going to open plea to that but once the
19 Romanians were rounded up, that was pulled. There was no
12:37:04 20 plea. So we had no choice but to go to trial in this case,
21 Your Honor.

22 And I think -- and I'm not speaking for Mr. O'Shea,
23 but Mr. Miclaus had the same situation.

24 Now, I've made the argument in brief. I think there's
12:37:17 25 a couple of things that the Court should consider when

1 evaluating the 3553 factors that I think are paramount.

2 I don't have a lot of personal information about
3 Mr. Nicolescu that would be helpful. You see it in the PSI
4 about his background, how he grew up, where he grew up, and
12:37:39 5 how he eventually got into this activity.

6 And I expect Mr. Nicolescu to be treated like any
7 other defendant standing before this Court under these
8 circumstances and not any better or any worse because of his
9 background.

12:37:56 10 But I think the Court has to look at disparity. And
11 in asking for a downward variance from the guidelines in my
12 brief, I attached some information on disparity, both in the
13 form of a law journal article talking about the issue with
14 the guidelines, and when it comes to computer crime,
12:38:19 15 white-collar crime in general, that goes more to a policy
16 disagreement argument that I'll make in a moment.

17 But I also attached a number of cases that are
18 similar, and it's -- goes to my argument about the white
19 whale syndrome when you look at the number one case that the
12:38:37 20 Government cites in their brief is a case that involved a
21 life sentence for somebody that had a worldwide fentanyl
22 conspiracy with people -- with dead people and with factors
23 that had nothing to do with this case, and that -- using
24 that to support a 360-month sentence that they're
12:39:01 25 requesting.

1 My cases that I both cite in the brief and then I also
2 just put them at the end in Exhibit C, just because I didn't
3 want to make the brief too long, are other cases from around
4 the country where similar conduct, even more loss conduct,
12:39:21 5 more serious sophistication has been punished less.

6 And there's a couple of cases that I cited. And I
7 know the Court has looked at my materials. I'm not going to
8 go through them again. I would just particularly point out
9 a couple of cases I think are far more relevant to
12:39:40 10 determining a variance in a proper sentence in this case
11 than the cases pointed out by the Government.

12 One is *Trifu*, T-R-I-F-U, where the Romanian defendant
13 received a sentence of 96 months, which was a substantial
14 downward variance. And *Borlea*, which was a -- similar as
12:40:02 15 well, where a 42-month sentence was imposed.

16 There was another case where the defendant went to
17 trial, which case was that -- and both of those defendants
18 went to trial in their case.

19 Other cases that I've cited were cases where there was
12:40:20 20 a negotiated settlement or at least a plea bargain, but the
21 sentences generally have not been guideline sentences. And
22 I think that's consistent with the practice of the district
23 courts throughout the country and in the Northern District
24 of Ohio.

12:40:38 25 And I did attach some Sentencing Commission data

1 regarding downward variances granted in money laundering and
2 fraud cases, and there seems -- it seems to be the highest
3 category of case when it comes to granting downward
4 variances.

12:40:56 5 In my sentencing memorandum, Your Honor, I ask the
6 Court to consider an aggregate sentence of 168 months, I
7 believe. It's 14 years. I don't believe that a
8 sentence -- that would be including one or more of the
9 counts of 1028A, aggravated identity theft tacked on.

12:41:24 10 I don't believe a sentence greater than that is
11 necessary to achieve the ends that 3553(a) supports.

12 I believe that there is no chance that a sentence in
13 that range, or even a sentence that's less than that would
14 send a message to anyone in Europe planning on trying to
12:41:46 15 conduct a similar scheme that America goes easy on these
16 kind of crimes. Other countries do, but America doesn't.

17 And 14 years in prison for a scheme, although it was
18 large and I acknowledge it, and it was long running, netted
19 my client no more than \$500,000 over the course of those
12:42:07 20 years.

21 And I understand that I'm standing here today
22 representing a client who exercised his right to trial, and,
23 again, I don't think he had a choice. I don't think the
24 Government wanted him to plead. I think they wanted to put
12:42:20 25 the case on, and that's their right as well.

1 So when you look at just the disparities of these
2 other cases that would be created by a guideline sentence
3 here without a substantial variance, I think that the
4 sentence based on the percentage of the guidelines that I'm
12:42:47 5 recommending that -- as a defense attorney for
6 Mr. Nicolescu, I think that that addresses the disparity
7 concern in 3553.

8 With regard to policy disagreements, Your Honor, my
9 argument on policy disagreements is pretty much encapsulated
12:43:05 10 in -- I believe it's Exhibit A. It's the law journal
11 article -- where -- and I could have found probably a lot
12 more scholarly research on the subject -- but where the
13 professors who prepared that article talk about how
14 they -- the guidelines are evolving, and unfortunately, for
12:43:32 15 someone like Mr. Nicolescu, maybe are not fine tuned to his
16 type of situation, where we see overlapping factors, and
17 that there is some -- there is some support and authority
18 for addressing those overlapping factors and the
19 inordinately high guideline numbers that are resulting from
12:44:00 20 this type of crime.

21 Because unlike the Government, I don't think this
22 compares to a robbery with a gun. I don't think that this
23 type of activity compares to putting people in physical
24 danger. It is certainly punishable and it should be
12:44:15 25 punished and there should be a serious sentence netted out.

1 But I don't believe that there should be a sentence
2 that is similar to drug kingpins or terrorists or other
3 people that present a health threat to the community.

4 I admit what Mr. Nicolescu has been convicted of is
12:44:34 5 very serious and it should be discouraged. And a sentence
6 of 168 months in this case would have that effect. It would
7 punish him.

8 It would use the sanction that is no greater than
9 necessary to affect the deterrence of other people, to
12:44:50 10 prevent Mr. Nicolescu from preventing further crime -- from
11 committing further crime, and would provide him the
12 necessary resources to enter the community, whether it's
13 here or overseas, hopefully of a different mindset.

14 Hopefully there will be training. As a nonviolent
12:45:11 15 offender, hopefully he can put his considerable intelligence
16 and skill set to work when he is eventually released from
17 incarceration.

18 And the Government will probably argue that there's no
19 way that Mr. Nicolescu could ever be rehabilitated. He's
12:45:28 20 beyond rehabilitation.

21 Well, I don't think that's true. I think
22 Mr. Nicolescu went down a path that he knew was illegal and
23 knew was criminal. Didn't think he was going to get caught,
24 yes, but that was the path that was open to him given his
12:45:43 25 upbringing in eastern Europe, his skill set.

1 There was -- and his inability to leave. He couldn't
2 leave. He was stuck in Romania with his family and this was
3 the path he went.

4 Given the opportunities that he would have had
12:45:58 5 elsewhere, he wouldn't have taken this path.

6 I truly believe that and I don't think that because he
7 continued this activity for over a long period of time or
8 was particularly cruel or adept at it, I don't think that
9 that means that he's beyond rehabilitation. 14 years is a
12:46:18 10 long time, Your Honor.

11 I'd also just wrap up by saying Mr. Nicolescu was --
12 has been in prison at this point for -- been incarcerated
13 for 3.5 years, I believe. He was arrested in July of 2016.

14 He's been incarcerated in various holding facilities,
12:46:36 15 extradited from Romania. He stands a substantial period of
16 time in prison after today and I think that the way he was
17 arrested and ripped out of his home country, brought back to
18 the United States, I think that adds to the deterrent effect
19 in Europe and to other people that may undertake this
12:46:59 20 activity.

21 All that being said, Your Honor, I would ask the Court
22 to consider the sentence -- to consider in the sentence a
23 downward variance from the guideline that we've determined
24 here this morning and this afternoon and sentence
12:47:14 25 Mr. Nicolescu substantially below that.

1 I've recommended 14 years, but I'll leave it to the
2 Court's discretion in terms of whether to grant or -- and
3 how large that variance could be. Thank you.

4 THE COURT: Mr. Nicolescu, do you have
12:47:28 5 anything to say, sir?

6 THE DEFENDANT: Yeah.

7 During trial I've been moved by the human pain.

8 THE COURT: Could you -- thank you.

9 THE DEFENDANT: I'm sorry. During trial I've
12:47:42 10 been moved by the human pain that was expressed by the
11 victims that testified, and seeing or hearing those stories
12 have -- has opened my eyes to the reality of the situation,
13 and I have developed a better appreciation for the extent to
14 which real lives were affected.

12:48:03 15 I can only hope that my incarceration helps those
16 victims. My -- my deepest hope is that upon my release, the
17 probation department could allow me to have a job in the
18 computer programming field.

19 And I wish to say I will never do anything to harm
12:48:29 20 anybody or anything that would otherwise -- could bring me
21 back to a courtroom. And I only wish to use my -- to use
22 my -- to do something positive using my skill, and not to
23 waste my life completely.

24 Thank you.

12:48:53 25 THE COURT: Thank you.

1 MR. BROWN: First of all, Your Honor, the
2 Government would ask, regardless of the sentence that you
3 hand down today, a condition of his incarceration and
4 supervised release is he has no contact with computers or
12:49:13 5 the Internet, and he certainly not be allowed to volunteer
6 any work for the Bureau of Prisons.

7 I think that it is the Government's position that it
8 is patently offensive and arrogant that he stand before the
9 Court, considering the course of this case, and say that he
12:49:29 10 wants to use his prison skills in prison for the good of
11 people.

12 During the objections, and now, it's said that the
13 Government sees this case as a white whale or that we're
14 casting aspersions. The Government will firmly contend and
12:49:50 15 firmly state on the record that Mr. Nicolescu is a bad man.

16 That this was not a chase of a white whale across the
17 seas, but, in fact, nine years of pursuing an extremely
18 sophisticated, extremely dangerous individual who took steps
19 beyond normal behavior to hide his identity, to hide his
12:50:10 20 tracks, and to hide his future moves.

21 The Government should not be criticized for spending
22 nine years tracking this defendant down and working with
23 Romania to extradite him. And the Government will point out
24 that the extradition took three months, which is extremely
12:50:29 25 fast and extremely efficient for any country because of the

1 level of cooperation that the two countries had recognizing
2 the dangerousness of this defendant.

3 The Government would also point out that its
4 recommendations -- when it gets to its recommendations,
12:50:44 5 they're not based on law review articles, but we do look to
6 the assessment of academics and experts, one of whom took
7 the time out of his day -- actually took the time out of his
8 career to travel here in the courtroom.

9 The Government does want to recognize that Mr. Liam
12:51:06 10 O'Murchu is here. He's not here to collect a trophy or to
11 revel in the sentence.

12 He's here as a professional who is involved in this
13 case who has a vested interest in keeping the Internet safe
14 and secure and who works for a company who has a vested
12:51:22 15 interest in providing Internet safety for all consumers.

16 And the Government would like to point out that this
17 is not an academic exercise. This is, in fact, the
18 culmination of a lot of very sophisticated, dedicated work
19 of both the public and private sector.

12:51:36 20 And that dedicated work is not because we had to get a
21 scalp to hang on the wall, which is offensive to think, it's
22 because the Bayrob Group posed a significant and very
23 rarified danger to consumers worldwide on the Internet.

24 They started out as a very aggressive eBay fraud
12:51:57 25 system and piece of malware that infected computers and not

1 just infected them but then put Web pages that looked like
2 real eBay. They had eBay chats in very good English.

3 They had a level of sophistication with the eBay
4 escrow agents to lull consumers into thinking that they were
12:52:18 5 buying cars. And when they collected that information,
6 instead of just perpetuating this scheme, they evolved.

7 And I'd like to take a step back and point out that
8 some of the cases we cite here today -- and the Government
9 would say largely all the cases the defense provides -- are
12:52:37 10 flawed in that the nature of Internet crime and the nature
11 of cybercrime is changing, specifically because of
12 defendants like Mr. Nicolescu -- and I'll include
13 Mr. Miclaus in that and I'll include Mr. Danet in that -- is
14 that these are not people stealing a credit card and busting
12:52:56 15 it out, to use the vernacular, "running up a large bill."
16 They are patient. They are deliberate. They are selling
17 them on places like eBay -- or AlphaBay or Silk Road to give
18 the opportunity for others to exploit those cards also.
19 This is not -- every comparison falls short.

12:53:21 20 This is not the difference between a person robbing a
21 bank with a gun and a person hacking into a bank and
22 stealing a million dollars, which is what most of those
23 comparison are.

24 This would be one person stealing from 50 million
12:53:35 25 banks or one person hacking into 50 million banks. The

1 scale and the scope of the criminal enterprise is
2 fundamentally different than most cases out there.

3 The closest thing really in recent press that this
4 could compare to is two days ago or maybe yesterday, two
12:53:51 5 Russian hackers were arrested -- or indictments were issued
6 from the Northern District of California, and I want to say
7 Missouri; is that correct?

8 MR. MACFARLANE: Pittsburgh and Omaha.

9 MR. BROWN: Pittsburgh and Omaha.

12:54:03 10 My geography is atrocious outside of the northern
11 district of Ohio.

12 It was almost as sophisticated -- possibly as
13 sophisticated of a scheme, but they're in Russia and they're
14 not coming back.

12:54:16 15 And we have these defendants. We worked very hard to
16 make sure we got these defendants who were in 2016 and, you
17 know, still going forward, some of most sophisticated
18 examples of criminal activity in the world in this field.

19 You know, for Mr. Goldberg to say that the defendant
12:54:35 20 should be granted some consideration because he couldn't
21 leave Romania, well, Mr. Danet had interned at Google. He
22 finished school. He didn't drop out. He got a Master's.
23 He interned at Google. He had the opportunity to go back to
24 Google. Google wanted to hire him.

12:54:52 25 Mr. Nicolescu had that opportunity as well. He

1 dropped out of college because he saw there was more value
2 in being a criminal than being legitimate. That's not
3 something to feel sorry about. That was a deliberate choice
4 by somebody who has skills and abilities that most people
12:55:09 5 would never even dream of.

6 And he squandered it for criminal enterprise.

7 And the Government's position is we can't feel sorry
8 for somebody who makes that choice and then throws himself
9 on the mercy of the Court for saying, look, I didn't have
12:55:21 10 any opportunities. He took those opportunities away from
11 himself when he made the choice to become a cyber criminal.

12 Likewise, he says he claims he only netted 500,000.
13 The Government contends that that's a mere shell of what he
14 actually earned. And in part we may never know how much he
12:55:39 15 earned, because like everything else in this criminal
16 conspiracy, he hid behind multiple layers of encryption and
17 multiple layers of obfuscation.

18 The LUKS partitions and all of the different layers of
19 encryption that we may or may not ever be able to break into
12:55:57 20 is where he was hiding, the Government contends, his money.

21 So, again, the posture that he's coming asking for the
22 mercy of the Court is, I think, a disingenuous and
23 unbelievable posture based on his activity.

24 And again, the Government would point out that we
12:56:14 25 spent a lot of time on loss amount and I started off talking

1 about how loss amount is sort of a crude calculation for
2 this kind of crime.

3 On the servers, we saw the beginnings of what the
4 eBay -- or the Bayrob Group was becoming in the download of
12:56:32 5 the browsers.

6 We saw people's web history and credentials for sites,
7 not illegal sites, but embarrassing sites, pornographic
8 sites that people would not want to know -- other people to
9 know that they were visiting.

12:56:47 10 We saw plenty of bank information, the Wells Fargo,
11 the Bank of America.

12 We did see -- and we attached it as an exhibit, I
13 believe -- of a working schematic and an interactive
14 schematic from a power plant in Lorain, Ohio where if it was
12:57:03 15 sold on AlphaBay, you could -- Special Agent Macfarlane
16 talked to the managers of the power plant. You could have
17 turned on and turned off parts of the power plant. You
18 could have disrupted the power grid.

19 This is the type of data -- and when we're talking in
12:57:15 20 the abstract world, this is the type of data we're talking
21 about that they are collecting. It was indiscriminate, but
22 in their mind it was going to become exploitable.

23 And they had the knowledge and the skill, all of them,
24 Nicolescu, Danet, and Miclaus, had the knowledge and skill
12:57:31 25 to exploit that.

1 They could mine -- they could write code. One of them
2 could write code, one of them could work databases, one of
3 them could post things. They had the ability to find
4 information, exploit information, and profit from that
12:57:47 5 information.

6 And, you know, I guess if we've got to go back to the
7 whaling analogy, we caught a big whale, but if he had been
8 allowed to continue to swim, it would have been even bigger
9 when we caught him.

12:57:59 10 These defendants are, the Government contends, unique
11 because they're not rehabilitatable. They have skills and
12 they have personalities where they really don't care who
13 they exploit, because it's money.

14 And Nicolescu said this in one of his Jabber chats.
12:58:16 15 First we had the money, then we had the power, soon we'll
16 have both.

17 And that was in 1516 as the botnet was growing and
18 changing from eBay to pure data mining exploitation.

19 Your Honor, the Government in this case would suggest
12:58:29 20 and would recommend that the full 240 months, the statutory
21 maximum, be imposed in this defendant.

22 And Your Honor, we would also like to be heard
23 specifically on the aggravated identity theft. We're
24 recommending that all five be run consecutive to each other
12:58:46 25 and to the 240 months.

1 These defendants didn't just exploit dead credit
2 cards. They didn't steal envelopes out of the mailboxes
3 like credit card thefts used to be. They didn't just buy
4 things from AlphaBay.

12:58:59 5 You heard from five residents in the Northern District
6 of Ohio whose lives were affected by this, and more if you
7 count Ms. Liddy and others from outside the district.

8 You heard of -- from a cabinetmaker who is still --
9 you know, he had -- for years had to change his credit
12:59:17 10 accounts because checks kept coming back and accounts kept
11 coming back because the credit card was stolen. He had to
12 cancel it.

13 You know, was it a significant loss, no, it wasn't
14 millions of dollars, but it was ongoing and it was a hassle,
12:59:32 15 and it was an invasion of these people's privacies and sense
16 of security. And these were people in the Northern District
17 of Ohio. That's why we brought them in.

18 And we think that each of those five victims should be
19 given full due credit and full recognition of not only what
12:59:45 20 they had to go through, but also as the representation of
21 the hundreds of victims who responded to our Internet
22 surveys that made up the victim lists that were submitted to
23 Court.

24 So for those reasons, Your Honor, the Government is
12:59:59 25 asking for 360 months for defendant Nicolescu. Thank you.

1 THE COURT: Mr. Goldberg, anything else?

2 MR. GOLDBERG: The only thing I would respond
3 to say is the analogy, although a little bit flippant about
4 a white whale syndrome, was to reference the lack of
13:00:24 5 negotiation or ability to resolve the case, not -- not
6 criticizing the Government in any other way. They went
7 after somebody that had, in their view, committed serious
8 crimes. It was basically the inability to really work
9 something out once I got involved in the case.

13:00:45 10 MR. BROWN: Your Honor, we had a Frye hearing
11 before trial where the discussion of negotiations and pleas
12 were discussed and the defendant on the record rejected the
13 final offers.

14 THE COURT: Ms. Morgan, anything before I
13:00:55 15 pronounce sentence?

16 PRETRIAL PROBATION OFFICER: No, Your Honor.

17 THE COURT: Mr. Nicolescu, it is the judgment
18 of this Court that you be committed to the custody of the
19 Bureau of Prisons to be in prison for a term of 216 months
13:01:06 20 on Counts 1 through 13 and Count 21; 60 months on Count 14;
21 120 months on Count 15, all to be served concurrently with
22 each other.

23 In addition, I am sentencing you to 24 months on each
24 of Counts 16 to 20 to be served concurrently with each
13:01:38 25 other, but consecutively with all other counts for a total

1 term of imprisonment of 240 months.

2 Upon release from imprisonment, you will be placed on
3 supervised release for a term of three years. That's three
4 years on Counts 1 to 15 and 21 and one year on Counts 16 to
13:01:57 5 20, all to be served concurrently.

6 Within 72 hours of release from the custody of the
7 Bureau of Prisons you must report in person to the probation
8 office in the district to which you are released.

9 There is a special assessment of \$2,100 due and
13:02:14 10 payable today.

11 While on supervision, you must comply with all of the
12 mandatory and standard conditions adopted by this Court.
13 They are set forth in Part D of your report.

14 In addition, you must surrender to the Bureau of
13:02:31 15 Immigration and Customs Enforcement U.S. Department of
16 Homeland Security for deportation as provided by law.

17 If you are ordered deported from the United States,
18 you must remain outside the United States unless legally
19 authorized to reenter.

13:02:45 20 If you do reenter, you must report to the nearest
21 probation office within 72 hours after you return.

22 You must submit to a warrantless search based only
23 upon reasonable suspicion of contraband or evidence of a
24 violation of a condition of release.

13:03:01 25 You must not engage in an occupation, business

1 profession, or volunteer activity involving information
2 technology without the prior approval of your probation
3 officer.

4 So it's going to be a determination by your officer.

13:03:18 5 You must allow the probation officer to install computer
6 monitoring software on any computer that you use.

7 I am going to add the computer search for monitoring
8 software condition. I'm also adding the computer search
9 warning to others condition.

13:03:39 10 You must provide your officer with access to any
11 requested financial information and authorize the release of
12 any financial information. You may not incur any new credit
13 charges or open additional lines of credit without the
14 approval of your officer.

13:03:56 15 You must apply all monies received from income tax
16 refunds, lottery winnings, judgments, et cetera, to your
17 financial obligation. You may not access the Internet
18 without approval of your officer.

19 Let me inform you that you do have the right to appeal
13:04:10 20 your conviction and sentence to the extent -- strike that.

21 You have the right to appeal. If you cannot afford to
22 appeal, the cost will be borne by the Government.

23 I do, in fact, find the sentence to be sufficient, but
24 not greater than necessary to satisfy the purposes of
13:04:28 25 sentencing.

1 Let me start with the Government's request of a
2 30-year sentence. I have to ask whether a sentence that is
3 equivalent to one imposed for murder, rape, or terrorism is
4 appropriate, and I find that the answer is no.

13:04:45 5 I find that the scheme caused tremendous damage to a
6 large number of individuals, but I also acknowledge it
7 didn't leave any individual destitute.

8 I also do acknowledge that the defendant was acquitted
9 of the enhancement, and that is different than what occurred
13:05:12 10 at the plea negotiation stage, as was pointed out by
11 Mr. Goldberg, and I do note that the enhancement did, in
12 fact, carry an additional seven-year prison term, and he was
13 acquitted of that.

14 That all being said, this Court cannot justify a
13:05:31 15 sentence as low as what Mr. Goldberg has advocated for.

16 I do consider this to be a very serious scheme that
17 warrants a very serious sentence. The defendant victimized
18 a large number of people from another continent. The
19 complexity of the scheme allowed the defendant's criminal
13:05:57 20 behavior to continue unabated for nearly a decade.

21 I find that tremendous resources had to be used from a
22 number of governments, as well as private sector forensic
23 computer experts. They were all expended in an effort to
24 capture this defendant and stop him from victimizing even
13:06:25 25 more people.

1 And, frankly, I see many defendants come before me who
2 simply have little or no chance of achieving in life due to
3 their circumstances.

4 But, sir, you are very different. You were given the
13:06:43 5 gifts of tremendous intelligence and skill and instead of
6 using those gifts for good, you chose a path of crime. And
7 you did it because of greed.

8 You didn't want to work hard enough to earn money
9 honestly. But you certainly had the ability to do so.

13:07:03 10 I also find that a lengthy sentence is appropriate in
11 order to protect the public from further crimes, and to
12 deter similar conduct. Such a sentence is necessary to send
13 a message to others like the defendant who operate well
14 planned and what I call heartless computer crimes.

13:07:24 15 I want to send the message that if you engage in this
16 conduct, you are going to be caught and justice will be
17 served. And when you are caught, consequences are very,
18 very serious.

19 It is for those reasons that this Court finds the
13:07:42 20 sentence to be sufficient, but not greater than necessary to
21 satisfy the purposes of sentencing.

22 Let me go further. I have attempted to identify
23 mitigating factors, and the only two mitigating factors I
24 can identify is the fact that the defendant has no criminal
13:07:59 25 record and that this was not a crime of violence.

1 But, again, a very serious crime.

2 Mr. Goldberg, you are, for the record, maintaining all
3 of your objections?

4 MR. GOLDBERG: That's correct, Your Honor.

13:08:17 5 THE COURT: And I'm preserving those for you.
6 Any other objections?

7 MR. GOLDBERG: I would ask the Court to note
8 an objection to the sentence to the extent it exceeds the
9 recommendation made in the sentencing memorandum filed by
13:08:29 10 the defendant. Other than that, no objections.

11 THE COURT: Fair enough.

12 MR. GOLDBERG: Thank you.

13 THE COURT: And anything further?

14 MR. GOLDBERG: No, Your Honor. Thank you.

13:08:36 15 THE COURT: Okay. Mr. Brown.

16 First of all, sir --

17 MR. BROWN: Yes, Your Honor.

18 THE COURT: -- any objections?

19 MR. BROWN: None at all, Your Honor.

13:08:41 20 THE COURT: And secondly, anything further?

21 MR. BROWN: No, Your Honor. Thank you very
22 much.

23 THE COURT: Ms. Morgan, as to this defendant,
24 anything else?

13:08:48 25 PRETRIAL PROBATION OFFICER: No, Your Honor.

1 MR. GOLDBERG: Your Honor, I'm sorry. I have
2 one additional thing.

3 THE COURT: Oh, sure.

4 MR. GOLDBERG: I would ask the Court to
13:08:56 5 consider -- and I understand the nature of Mr. Nicolescu may
6 require the Court to defer to the BOP completely, but to the
7 extent that you could make a recommendation to Allenwood,
8 Pennsylvania Federal Correctional Facility, we would ask the
9 Court to do that.

13:09:10 10 I'm sorry. He does have family in the United States,
11 not necessarily in that area, but that would be convenient
12 for them.

13 MR. BROWN: Your Honor, our only
14 recommendation is that he be somewhere that can handle
13:09:24 15 sufficiently the restrictions placed on him for
16 communication.

17 THE COURT: Yeah, that's a given.

18 MR. BROWN: Right.

19 THE COURT: So you're not objecting to the
13:09:33 20 recommendation?

21 MR. BROWN: We have no ability to --

22 THE COURT: No reason one way or the other.

23 MR. BROWN: We have no authority in that.

24 MR. O'SHEA: Nothing further, Your Honor.

13:09:43 25 THE COURT: So no recommendation on that.

1 MR. O'SHEA: No.

2 THE COURT: Well, I will recommend it, but as
3 you say, Mr. Goldberg, it's purely a recommendation. The
4 Bureau of Prisons will make that determination.

13:09:53 5 MR. GOLDBERG: Thank you, Your Honor.

6 THE COURT: All right. You're all set,
7 Mr. Nicolescu.

8 Mr. O'Shea, should I turn to you first?

9 MR. O'SHEA: Yes, Your Honor.

13:10:03 10 THE COURT: Or your client.

11 MR. O'SHEA: Me first, if I can, Your Honor.

12 THE COURT: You go right ahead.

13 MR. O'SHEA: All right.

14 First and foremost, Judge, for purposes of what I'm
13:10:19 15 doing here at this podium in your courtroom, I would ask
16 that you consider that I'm going to make some comments to
17 you based upon the law and equity as I see it.

18 To the extent that the Government disagrees with me or
19 the Court might -- and I know this to be true, but just let
13:10:36 20 me say it. Please hold it against me and not my client.

21 My client has a long statement that he would like to
22 make to you today. I don't know whether we want to take a
23 break or not, but it's a long one, Your Honor, about how he
24 feels about what he has done and his contrition, all right.

13:10:54 25 THE COURT: Is it the same one that was

1 already provided to me?

2 MR. O'SHEA: I think so, yes, Your Honor.

3 THE COURT: I received it yesterday evening.

4 MR. O'SHEA: All right. Very well, Judge.

13:11:05 5 THE COURT: And I did, in fact, read it in its
6 entirety this morning, even making it a point to get here
7 extra early so that I could have the time to read it.

8 MR. O'SHEA: Thank you, Your Honor.

9 That's -- then we don't need to necessarily --

13:11:20 10 THE COURT: Sir, I'm directing this to you.

11 I did, in fact, read it in its entirety.

12 DEFENDANT MICLAUS: Thank you.

13 MR. O'SHEA: Thank you, Your Honor.

14 Moving on, then. In my sentencing memorandum, I make
13:11:37 15 reference to page 44 of the departure in variance primer
16 where it says the issues that are subject -- that may not,
17 rather, be subject to a departure, but may nevertheless be
18 the basis of a variance, and I don't think the Government
19 disagrees with me on that.

13:11:49 20 Attached to our -- well, my client's sentencing
21 memorandum were these exhibits that kind of give the Court
22 some background as it relates to, as we have on Exhibit A,
23 quick facts, again, set forth by the Sentencing Commission
24 relative to theft, property destruction, and fraud offenses.

13:12:11 25 And Exhibit B, quick facts and circumstances involving

1 money laundering offenses, and then of course, Exhibit C,
2 copyright and trademark offenses.

3 Kind of giving the Court an idea of context, you know,
4 nationwide and what the averages are and the like.

13:12:26 5 So -- and I'm sure the Government won't agree that
6 what are in those sentencing factors or quick facts are
7 relevant here, but nevertheless, that document, those three
8 documents were prepared by the federal government.

9 And the federal government take -- I assume the
13:12:42 10 Sentencing Commission took great pains to go make sure that
11 the facts that they were going to utilize in setting forth
12 those memorandums were accurate.

13 So I assume they're accurate and therefore, we pointed
14 out in our sentencing memorandum, you know, average
13:12:58 15 sentences, number of cases where we have had variances. So
16 I assume that's accurate.

17 So I think any Court could be comfortable in relying
18 on those when it comes to trying to formulate a sentence in
19 a case like this.

13:13:14 20 Now, I get and anticipate the fact that the Government
21 will argue that this is a really unique type of case, not
22 one of the average ones. But I don't see anything in those
23 memos that say that cases like this weren't taken into
24 consideration with coming up with those averages and those
13:13:33 25 facts.

1 So I emphasize those and we attached them as exhibits
2 to our sentencing memorandum for that very purpose.

3 One thing I'd also like to point out, Your Honor, in
4 this presentence investigation -- I should have brought this
13:13:45 5 up as an objection, but I don't know if it is.

6 It says that his arrest date is 12-16-16. My
7 understanding is he was arrested in September of 2016, about
8 three months earlier. So he obviously should get some sort
9 of credit on that. I don't think the Government would
13:14:01 10 disagree with me on that, either.

11 I don't think also the Government would disagree with
12 me on the fact that my client is not MasterFraud, and I'm
13 asking this Court to consider the fact that the guy named
14 MasterFraud was either by himself or by the Government given
13:14:17 15 that name for a reason. My client had no such nickname. No
16 powerful title like MasterFraud.

17 So we've argued very, I think, fairly, and I hope the
18 Government believes that at least the argument is fair, that
19 my client, when compared to others in this organization,
13:14:36 20 this Bayrob Group, had a participation level, an
21 organizational level, a mastermind, master fraud level, you
22 know, way, way less when compared to people that got plea
23 deals and people that are going to receive zero time in
24 jail. Zero.

13:14:57 25 So when talking about the variances in this case, I,

1 again, because like I said, on page 44, the primer, we get
2 to emphasize his role, and I know that the Court for
3 purposes of a departure and in calculating the sentencing
4 guideline range disagreed with me about the role.

13:15:19 5 But the fact -- you know, and I think it was somewhat
6 of a -- if you excuse the argument, Your Honor -- a
7 technical argument, because we're arguing guidelines and
8 departures here.

9 But here when it comes to variances, we get to argue a
13:15:34 10 little bit more of, you know, really planet earth type of
11 stuff. What goes on in his life and comparing him to the
12 others in this case.

13 So I'm asking this Court in determining whatever
14 sentence the Court chooses to impose on my client, that the
13:15:51 15 Court consider that.

16 Now, as we pointed out -- and by the way, Your Honor,
17 again there was a typo, I just noticed it this morning on
18 page 26 of our sentencing memorandum. I have where it says
19 the sentence, I have 94 to 11 months. It should be 111
13:16:05 20 months. I'm sure you caught that anyway, Judge.

21 THE COURT: I knew that.

22 MR. O'SHEA: All right. But, you know, we
23 pointed out, Judge, the only thing that changed with my
24 client was -- and I think Mr. Goldberg emphasized this -- is
13:16:24 25 that he went to trial. Okay.

1 I don't think -- and I think that the Government is
2 going to agree with me -- that my client did anything to
3 obstruct justice other than if you want to say just sitting
4 in the chair and listening while the case was presented.

13:16:37 5 As we all know at this point, you know, and for a
6 while we tried to not broadcast something like this, but my
7 client proffered. And from what I remember from my
8 conversations with the Government -- and I trust them when I
9 tell me this stuff -- proffered well.

13:16:53 10 And I think if we -- if we ask ourselves the question,
11 be it the Court, be it the Government, including myself,
12 that we have almost rarely, if ever, seen a situation where
13 an individual in a situation, any type of conspiracy,
14 proffers, proffers well, but then goes to trial.

13:17:12 15 So we are in unique and virgin territory here about
16 how do we -- how do we deal with a situation where somebody
17 proffers well, assists the Government, but nevertheless goes
18 to trial, and the only reason they go to trial is because
19 what the Government wants them to do, that 94 to 111 months,
13:17:33 20 is not what they want to do as far as the sentence.

21 That was the only disagreement that the defendant had,
22 Your Honor. That's it. There is no other disagreement. He
23 didn't obstruct. He didn't do anything other than
24 cooperate.

13:17:47 25 And I'll bet you if you ask anybody in the U.S.

1 Marshal's office, or anybody at the Euclid jail where he
2 spent time, or at the Cuyahoga County jail, that he was
3 nothing other than a polite, cooperative, pleasant person to
4 deal with on a daily basis.

13:18:01 5 And, you know, for whatever value it does have,
6 Your Honor, as I think has been pointed out to you in some
7 of the writings the defendant has supplied to you, my
8 client, to a certain degree, for whatever value it has, was
9 a victim of the craziness at the Cuyahoga County jail.

13:18:16 10 Because by merely attempting to exercise his right to
11 have access to a computer so he could, you know, examine
12 evidence in this case, Your Honor, that both I, and I think
13 the Court took great pains to do and issue orders so that
14 that could happen, that that was thwarted, not through
13:18:33 15 anybody's in this courtroom's fault at all. But
16 nevertheless, it had an impact on the guy.

17 And, you know, the fact that he was at the
18 Cuyahoga County jail is kind of my fault because I thought
19 that would be a better place. I didn't want him anywhere
13:18:48 20 near this guy over here, MasterFraud at CCA, and obviously,
21 I was right about that.

22 But the fact that he ended up in Cuyahoga County jail
23 and he was sent into the hole as long as he was for merely
24 asking to look at his evidence is something I ask the Court
13:19:03 25 to take into consideration in the totality of what the Court

1 is about to do.

2 Now, I call in my sentencing memorandum this thing
3 called a proffer factor, okay, because it is a factor I'm
4 asking this Court to take into consideration when, A,
13:19:21 5 sentencing him, and B, analyzing him and comparing him to
6 the other persons that were part of this Bayrob Group, both
7 indicted and non-indicted, both charged and uncharged,
8 because the law allows you to do it.

9 And then, you know, I know that the Government
13:19:46 10 disagrees with this, but I call this the mope factor. I've
11 been doing this long enough to know that the guy who is
12 the -- for instance, to use the analogy of a guy who
13 transports the drugs from Chicago to Cleveland -- and I
14 think this is what the Government is going to try to
13:20:04 15 argue -- is somehow an organizer or a leader because he or
16 she knows what's going on as part of the organization.

17 And I think that Agent Macfarlane said it best this
18 morning when he said, at best -- and the question was
19 brought out of him by the Government -- that Mr. Miclaus was
13:20:26 20 aware of what's going on.

21 I don't think, to be honest -- and again, I'm talking
22 about this thing I call the mope factor. The mere fact that
23 he's aware of what MasterFraud is doing doesn't make him a
24 manager, organizer, or a leader.

13:20:43 25 And the Government made that argument here this

1 morning and this afternoon, that because he's aware of what
2 this MasterFraud guy was doing, that somehow he's a leader
3 or an organizer.

4 And I go back to my McDonald's analogy again, and
13:21:04 5 maybe it's not the best analogy. Again, if it's not,
6 Your Honor, hold it against me and not against Mr. Miclaus.

7 That it is clearly unfair and inequitable to argue
8 that Mr. Miclaus holds the same rank and role in this
9 organization as that of MasterFraud. It is against the
13:21:21 10 facts and it is against equity and fairness. It is.

11 So I ask the Court to consider how he was involved.

12 Now, I didn't hear that Mr. MasterFraud was -- had any
13 other job other than being MasterFraud. Again, blame that
14 on my recollection of what we heard at trial.

13:21:43 15 But I did hear that this man was working, my client,
16 Mr. Miclaus, that -- and I think the Government won't
17 disagree with this -- based on their investigation, this guy
18 did not just -- he wasn't just a skydiver, part time, that's
19 not true. He did thousands of skydives. He was an
13:21:59 20 instructor, a worker. He had jobs.

21 And this stuff that he was doing -- if we look at the
22 real facts -- was something that he was kind of doing on the
23 side. But it wasn't his, you know, sole profession like it
24 was for Mr. MasterFraud. So I don't expect the Government
13:22:17 25 is going to argue that. I hope they don't.

1 So, again, I'm asking -- I'm pointing this out,
2 Your Honor, because I'm asking you to compare my client to
3 Mr. Danet, who's got himself a deal, obviously, and to the
4 unindicted, uncharged folks that they flew over here free of
13:22:39 5 charge.

6 So please compare him with the facts that you know
7 that he was involved with from the trial rather than just
8 simply argument.

9 Now, one of the things that we also make reference to
13:22:51 10 on page 22 of our sentencing memorandum -- and I don't know
11 if I'm making the best argument about this -- is dependence
12 upon criminal activity for livelihood.

13 Now, I remember one of the more remarkable things at
14 trial is when one of these witnesses that they brought over
13:23:07 15 here, that they flew over here, on cross-examination or
16 direct examination -- I can't remember which -- was asked
17 about his high school class in Romania.

18 And the question was asked, Well, how many students,
19 fellow students in that high school class in the computer
13:23:24 20 class was engaging in computer fraud?

21 And the witness quite frankly said, I think almost
22 everybody. It's almost like a way of life over there.

23 Now, I'm not saying to you that that's an excuse for
24 engaging in criminal conduct, but it does provide some
13:23:41 25 context about where my client lives and what my client

1 experienced growing up.

2 So that's the reason we point it out. That was a
3 Government witness who said that, and I assume under oath,
4 that told the truth.

13:23:55 5 Now, we also know that as you've already pointed out,
6 Your Honor, my client, for purposes of the variance that I'm
7 asking for here today, is zero criminal history points.

8 And I don't know that the Government is going to argue
9 this like they did with MasterFraud here, but there's zero
13:24:14 10 chance that my client is going to re-offend.

11 They can make this argument, but my client has skills
12 way behind beyond that of being involved in the Bayrob
13 Group, and I think that was presented at trial.

14 Now, we also know that my client will be deported back
13:24:31 15 to Romania when he gets out of the institution that he gets
16 assigned to. We know that.

17 We also know that he was apprehended in his home
18 country, brought over here, that he has a certain amount of
19 depression that he suffered because while here, of course as
13:24:45 20 the Government is aware, his mother passed away. He wasn't
21 there for that.

22 I can't imagine what kind of impact that has on you,
23 what type of guilt you have to live with and resentment of
24 yourself, not the Government, because of that event. I
13:25:02 25 can't imagine that happening to anybody.

1 And if that's not -- not enough punishment, but a
2 punishment that we might consider in determining his
3 sentence.

4 We also point out, again, Your Honor, that the
13:25:14 5 comparison to people charged and uncharged in this case --
6 and I know that the Government, I get it, has to make tough
7 decisions when they're going to go to trial. I get that.

8 But the fact that people got to sit right up there who
9 had actively, in my opinion, Judge -- again, hold this
13:25:36 10 against me if I'm wrong -- actively more involvement in the
11 Bayrob Group, active, conscious greed that exceeded that of
12 my client, who will never see a day behind bars and who only
13 get out the "get out of jail" card solely because they
14 agreed to get on a plane and fly over here free of charge.

13:25:58 15 So I'm not quite sure how the Government could say
16 that that's okay, but my client has got to get all the years
17 that they're going to argue for. I'm not even sure what
18 they're going to argue for in light of what's developed this
19 morning.

13:26:14 20 So I think I have been doing this long enough to know
21 that I rarely have a client who is cooperative and polite in
22 getting things done, who treats his captors and his
23 prosecutors with as much dignity and fairness as this guy
24 has.

13:26:33 25 I will tell you this, Judge. That as you can see from

1 that 34-page letter that he wrote you, this is a unique
2 individual when compared to other people that have probably
3 appeared in your courtroom.

4 I'm not saying he's a better human, but how often is
13:26:54 5 it that a guy takes the time to pen a 34-page life story to
6 you trying to tell you how you got here. And I'm going to
7 ask you to consider that very strongly because it's not
8 every day.

9 As a matter of fact, I've never seen it, so I can't
13:27:09 10 imagine a guy who has not -- who's not demonstrated more
11 polite cooperation, respect.

12 I get it that he was doing stuff before he was
13 apprehended, I get that, but after that, after he got here,
14 working with the Government, being polite to them,
13:27:25 15 cooperative with them, making an incredibly potentially bad
16 decision to take the case to trial after doing what he did,
17 I'm asking you to consider that, Judge, because it's not an
18 everyday event, and I just -- I haven't seen it.

19 So, please, I plead to you, take that into
13:27:43 20 consideration when determining what happens for Mr. Miclaus
21 the rest of his life, Judge.

22 THE COURT: And, sir, do you have anything to
23 say other than what you've already put into your
24 correspondence?

13:27:57 25 DEFENDANT MICLAUS: No, thank you. No, Your

1 Honor.

2 THE COURT: And please accept my sympathy on
3 the loss of your mother. I did, in fact, read that in your
4 letter to me.

13:28:07 5 DEFENDANT MICLAUS: Thank you.

6 THE COURT: Mr. Brown.

7 MR. BROWN: Your Honor, like with
8 Mr. Nicolescu, we held a Frye hearing on the record in open
9 court where all offers of settlement were rejected by the
10 defendant, knowingly, voluntarily, and of his own free will.

11 The Government will also say that although the
12 defendant did proffer, when it became clear he was not
13 pleading, we did not affirmatively use any information that
14 he provided as per the terms of the letter.

13:28:37 15 We did not violate any sort of ethical duties by
16 taking a proffer and using it improperly.

17 So we want the record to reflect that. That, again,
18 the suggestion that the Government assisted or was assisted
19 by the proffer is not true. We -- if anything, we -- we had
13:29:01 20 to recalibrate after thinking that he was going to honor the
21 plea deal. He didn't.

22 The Government would also like to point out -- and
23 this is very interesting because of the names MasterFraud
24 and Amightysa, which are very -- you know, lots of bravado
13:29:18 25 and gusto there.

1 You know, Miclaus's nickname was -- both of them were
2 for stuff he bought. The Minolta 9797 was because he liked
3 Minolta digital cameras, which are not cheap, and RaduSPR01
4 is the license plate of his BMW.

13:29:37 5 So this defendant is not lacking in, you know,
6 self-aggrandizer sense of self-worth here. He's naming
7 himself after all the cash he's spending. And he did
8 travel, too.

9 And, look, he was a part-time skydiving instructor,
13:29:57 10 and he was able to travel throughout Europe. He was able to
11 stay -- yeah, he went to Spain, he went to other places on
12 vacations. He was benefiting financially from the criminal
13 enterprise that he was engaged in.

14 And, likewise, the people who came over and testified
13:30:12 15 were participants in the scheme at various points in time.
16 They all left the scheme. They all stopped the scheme.

17 The two constant members of the Bayrob Group were
18 Nicolescu and Miclaus. Miclaus was always there from the
19 beginning and he was there at the end. Was he -- did he
13:30:28 20 write the code? No.

21 Did he have the ability to write code? He absolutely
22 did.

23 I cannot stand here and I would not stand here today
24 and say he definitely did or did not. I don't think anybody
13:30:40 25 could, other than Nicolescu, Danet, and Miclaus, point to

1 specific things that they did or not do.

2 Obviously, we're not asking Mr. Miclaus to do that
3 today.

4 But he did financially benefit repeatedly from his
13:30:54 5 activity, his constant ongoing activity in the Bayrob
6 scheme. He was not some babe in the woods who was just
7 carried along or some naif who was thrown money every once
8 in a while just to keep quiet because they liked him.

9 He was an active participant. He knew what was going
13:31:11 10 on. He participated in what was going on. He had all of
11 the same computer systems and all of the same technology
12 that allowed him to go through the -- you know, the multiple
13 steps that were described, from the wireless router to the
14 SSH shells, tunneling through people's accounts to the VPNs
13:31:29 15 to the Tor router, to everything to get to the command and
16 control server, and he did. He did.

17 He was -- he is, not was. He's intelligent. He was
18 capable, and, again, he squandered those talents to live a
19 life of crime.

13:31:49 20 He could have, in high school -- he could have after
21 high school made other decisions and he didn't. He chose to
22 hitch his wagon to Nicolescu and to Danet. He did that
23 because he was making lots of money. And it was easy to
24 make money.

13:32:03 25 And, you know, I don't know how to explain it, but,

1 you know, in Danet's proffer he said, Look, every American
2 can stand to lose 10,000 bucks.

3 If we really want to look at the psyche of, and assess
4 a common psyche to an entire country, maybe that's the one.
13:32:23 5 It's the picture that all Americans are wealthy and stupid
6 and are deserving to be milked. And that's what drove
7 Miclaus, and he was a willing participant in all of this.

8 The Government would contend, absolutely it's not an
9 average case and we would urge, like we did with Nicolescu,
13:32:42 10 you throw those things out the window where they're looking
11 at a single bank robbery or a single credit card fraud.
12 This is not that.

13 It is a fraud on a massive, sophisticated evolving
14 scope, and at every point of its growth and every point of
13:32:57 15 its evolution, Mr. Miclaus was there, actively
16 participating.

17 He had the Jabber accounts between Nicolescu and
18 himself and Danet. He was talking to them through the
19 secured Jabber. He was keeping up to date on all of the
13:33:12 20 cryptomining.

21 He was not saying, hey, when are we going back to eBay
22 fraud, or, Hey, I got a new picture of a Camero. That
23 wasn't him. He went lockstep along as this scheme developed
24 because he was continuing to make money and continuing to
13:33:25 25 expand his role and his duties within the group.

1 Again, this was a group that prided itself in five
2 people, maybe three most of the time. He was one of the two
3 constants of that two, three, five-member group. Always
4 there.

13:33:40 5 And for him to suggest, Well, somebody else who had a
6 part-time role should be held accountable instead of me,
7 well, he was there and he stayed and he chose to stay.

8 And within that role, again, he wasn't -- he wasn't
9 the -- he wasn't the fry boy. He was the one posting the
13:34:01 10 ads. He was the one collecting money when it came -- you
11 know, when it was aggregated for Europe. He knew.

12 And who do you trust with the money other than one of
13 the guys in charge? You don't give it to the mope because
14 the mope is going to lose it or gamble it away or do
13:34:20 15 whatever. You give it to a trusted member and he was that
16 trusted member who got the money when it made that final
17 step back in the Bayrob Group. He was that trusted member.

18 And there is nothing inconsistent with his role with
19 that four-level that he got today and with anything that the
13:34:36 20 Government argued in its briefs.

21 And because of that, Your Honor, because he had the
22 opportunity at every step to be treated differently, to let
23 himself be treated differently or actively treat himself
24 differently to set himself apart, and at every step he
13:34:55 25 refused to do that.

1 He didn't have to get involved when they were doing
2 eBay fraud. He didn't have to post hundreds and hundreds
3 and hundreds of accounts. But he did. He didn't have to go
4 into the transition with the eBay -- or with the Y pool and
13:35:08 5 the cryptocurrency. But he did. He could have taken the
6 deal.

7 And at some point he has to be held accountable for
8 his actions, his ten years worth of actions that harmed
9 hundreds and thousands of people here, overseas, in the
13:35:22 10 Northern District -- as I already said, and I won't go back
11 through those victims, but he has to be held accountable.

12 And because of that, we're treating him equally as to
13 the other core members of the Bayrob Group, which is asking
14 for the maximum which is 240 months and the five
13:35:40 15 years -- the five aggravated identity thefts to be run
16 consecutively.

17 Thank you very much, Your Honor.

18 THE COURT: Ms. Morgan, anything, ma'am?

19 PRETRIAL PROBATION OFFICER: No, Your Honor.

13:35:49 20 THE COURT: It's the judgment --

21 MR. O'SHEA: May I just respond, Judge.

22 I never said my client was a babe in the woods. Never
23 said that, number one.

24 Number two, I never argued that the Government
13:35:59 25 violated any ethical duty.

1 THE COURT: No, I know.

2 MR. GOLDBERG: Never said that. Never would.

3 In addition to that, Judge, to argue that the proffer
4 wasn't useful is completely contrary to this fact that they
13:36:08 5 offered him 94 to 111 months and they're arguing something
6 different today based only on the fact that he went to
7 trial.

8 So for them to say the proffer was no good is the
9 antithesis of the offer that they gave him.

13:36:19 10 Thanks, Judge.

11 THE COURT: It's the judgment of this Court,
12 sir, that you be committed to the custody of the Bureau of
13 Prisons to be in prison for a term of 192 months on Counts 1
14 through 13 and 21, to be served concurrently to each other.

13:36:35 15 60 months on Count 14 to be served concurrently.

16 120 months on Count 15 to be served concurrently.

17 24 months on each of Counts 16 to 20 to be served
18 concurrently with each other, but the two years will be
19 served consecutively with the all -- with all other counts.

13:37:04 20 Mr. Goldberg, I certainly hope I made that clear as to
21 your client as well.

22 MR. GOLDBERG: My understanding was, one
23 24-month sentence --

24 THE COURT: Correct.

13:37:13 25 MR. GOLDBERG: -- they will all be served

1 together.

2 THE COURT: But consecutive.

3 MR. GOLDBERG: Consecutive to the underlying
4 events, yes.

13:37:21 5 THE COURT: That's for a total of 194 months.

6 Upon release from imprisonment, you will be placed on
7 supervised release for a term of three years.

8 On Counts 1 to 15 and 21, one year.

9 On Counts 16 to 20, all to run concurrently.

13:37:38 10 Within 72 hours of release from the custody of the
11 Bureau of Prisons you must report in person to the probation
12 office in the district to which you are released.

13 There is a \$2,100 special assessment due and payable
14 today.

13:37:50 15 While on supervision, you must comply with all of the
16 mandatory and standard conditions adopted by this Court.
17 They are set forth in Part D of the report.

18 In addition, you must surrender to the Bureau of
19 Immigration and Customs Enforcement U.S. Department of
13:38:06 20 Homeland Security for deportation as provided by law.

21 If you are ordered deported from the United States,
22 you must remain outside the United States unless legally
23 authorized to reenter.

24 If you reenter the United States, you must report to
13:38:20 25 the nearest probation office within 72 hours after your

1 return.

2 You must submit to a warrantless search based only
3 upon reasonable suspicion of contraband or evidence of a
4 violation of a condition of release.

13:38:32 5 You may not engage in an occupation, business,
6 profession, or volunteer activity involving information
7 technology without the prior approval of your officer.

8 You must allow your officer to install computer
9 monitoring software on any computer you use.

13:38:48 10 I'm also going to impose the computer search for
11 monitoring software and computer search warning to others
12 conditions.

13 You must provide your officer with access to any
14 requested financial information.

13:39:02 15 You may not incur any new credit charges or open
16 additional lines of credit without the approval of your
17 officer.

18 You must apply all monies received from income tax
19 refunds, lottery winnings, et cetera, to your financial
13:39:17 20 obligation.

21 Let me inform you, sir, that you do have the right to
22 appeal your conviction and sentence. If you cannot afford
23 to appeal, the cost will be borne by the Government.

24 I do, in fact, find the sentence to be sufficient, but
13:39:29 25 not greater than necessary to satisfy the purposes of

1 sentencing.

2 I incorporate all of the statements I made regarding
3 codefendant Nicolescu's sentencing, my rationale for his
4 sentence.

13:39:45 5 However, I'm going to add two points which accounts
6 for the lower sentence than Mr. Nicolescu.

7 I absolutely unequivocally stand by my ruling and my
8 statement that Mr. Miclaus was an organizer and leader, but
9 I also acknowledge the arguments somewhat of Mr. O'Shea,
13:40:16 10 that in the hierarchy, Nicolescu is at the top.

11 And I am, in fact, looking and comparing the
12 individuals, as urged by Mr. O'Shea.

13 My second reason for giving a lesser sentence is
14 because of the proffer. I totally understand the
13:40:44 15 Government's argument as to the proffer, but the fact of the
16 matter is at some point in time, this defendant admitted his
17 conduct. At no point did defendant Nicolescu do so.

18 Unfortunately for Mr. Miclaus, he did not follow
19 through on that proffer, and that decision has cost him
13:41:09 20 significant prison time and, in fact, basically doubled his
21 sentence.

22 I am allowed to consider the pretrial actions in
23 fashioning an appropriate sentence and I do, in fact,
24 believe that I can take into account the fact, again, that
13:41:30 25 at some point in time he admitted to his wrongdoing.

1 Mr. O'Shea, first of all, sir, other than all of your
2 objections, which are preserved and protected for the
3 record, any other objections?

4 MR. O'SHEA: Just basically mirror what
13:41:45 5 Mr. Goldberg said. We'd ask for the sentence in the
6 sentencing memorandum. Other than that, Your Honor, no.

7 THE COURT: And anything further?

8 MR. O'SHEA: Other than, Judge, I think I
9 pointed out that in the PSI, in case it goes down with him
13:41:59 10 to the Bureau of Prisons, his arrest date as I understand it
11 was September 29th, 2016, and not December 16th.

12 THE COURT: But I will tell you the Bureau of
13 Prisons, they have the accurate date and there will be
14 credit for time served. They compute that. They don't go
13:42:15 15 off the presentence report.

16 MR. O'SHEA: Fine and dandy, as long as
17 they're going to use the day he was arrested in Romania
18 rather than when he set foot here in the United States.

19 And I don't think the Government will argue about it.

13:42:29 20 THE COURT: Mr. Brown, Mr. McDonough?

21 MR. BROWN: I'm sorry. Goldberg was talking
22 to me.

23 THE COURT: He wants the date of arrest
24 changed in the presentence report. And frankly, I don't
13:42:42 25 have the date.

1 MR. BROWN: It's the September date,
2 Your Honor, is the date of arrest. However, I'm not sure
3 how BOP credits the --

4 THE COURT: Yeah, I don't get into that.
13:42:53 5 That's their business.

6 But you're not objecting to changing the date of
7 arrest to -- Mr. O'Shea?

8 MR. O'SHEA: September 29th, 2016.

9 THE COURT: September 29th, 2016.

13:43:04 10 MR. BROWN: As long as it also says the date
11 of arrival in the U.S. is December whatever. But, yeah.

12 MR. O'SHEA: I don't think they factually
13 dispute that he was arrested on September 29th, 2016, in
14 Romania, and never left the custody of any agency after
13:43:18 15 that.

16 THE COURT: That will be corrected. Anything
17 further? Anything else, Mr. O'Shea?

18 MR. O'SHEA: Nothing further, Your Honor.

19 THE COURT: First of all, Mr. Brown?

13:43:25 20 MR. BROWN: No objections and nothing further,
21 Your Honor.

22 AGENT MACFARLANE: Wait. Wait. Wait. Wait.

23 MR. BROWN: I spoke too early.

24 It's 192 plus 24, correct? So a total of 216?

13:43:53 25 THE COURT: I apologize. I apologize.

1 I did my math incorrectly. It is this Court's intent
2 to sentence defendant Miclaus to a total of 18 years.

3 Mr. Nicolescu received a total of 20 years.

4 I apologize. I think my math was off.

13:44:15 5 MR. BROWN: Now I've got to do math,
6 Your Honor.

7 THE COURT: I'm sorry?

8 MR. BROWN: Now I've got to do math,
9 Your Honor, real quick. Yeah. So it's a total of 18?

13:44:23 10 AGENT MACFARLANE: Yeah.

11 THE COURT: A total of 18 years.

12 MR. BROWN: Okay. Thank you, Your Honor.

13 (Discussion off the record.)

14 THE COURT: Mr. McDonough?

13:44:30 15 MR. BROWN: Right. So it would be 192 --

16 MR. McDONOUGH: Correct, Your Honor.

17 You said on Counts 1 through 13 and 21, 192 months.

18 Count 14 is 60 months.

19 Count 15 is 120 months. Those all run concurrent.

13:44:44 20 Count 16 to 20 are 24 months.

21 They're all concurrent to each other, but consecutive.

22 So the total sentence is 192 plus 24 for a total of
23 216 months, which is 18 years.

24 THE COURT: I think where I made an error is
13:45:00 25 when I did the total.

25